APPENDIX
TABLE OF CONTENTS

Page

United States Court of Appeals for the Ninth Circuit, No. 92-35044, Opinion of December 10, 1993 . . . . . App-1

United States Court of Appeals for the Ninth Circuit, No. 92-35044, Order and Opinion of June 7, 1995 . . . . . App-34

United States Court of Appeals for the Ninth Circuit, No. 92-35044, Order of January 24, 1996 . . . . . App-69

United States District Court for the District of Oregon, No. CV-91339-PA, Amended Opinion of January 8, 1992 . . . . . App-77

33 U.S.C. § 1311 . . . . . App-93

33 U.S.C. § 1312 . . . . . App-120

33 U.S.C. § 1313 . . . . . App-122

33 U.S.C. § 1319 . . . . . App-133

33 U.S.C. § 1342 . . . . . App-151

33 U.S.C. § 1365 . . . . . App-170

Page

Memorandum from United States Environmental Protection Agency, regarding Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits, Dated July 1, 1994 . . . . . App-174

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Northwest Environmental Advocates)		
A Non-Profit Oregon Corporation)		No. 92-35044
and Nina Bell,)		
Plaintiffs-Appellants,)		D.C. No.
v.)		CV-91-339-PA
City of Portland,)		
Defendant-Appellee.)		OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding
Argued and Submitted
May 6, 1993- Portland, Oregon

Filed December 10, 1993

Before: Harry Pregerson, Andrew J. Kleinfeld, Circuit Judges, and William Ingram, District Judge

Opinion by Judge Ingram; Partial Concurrence and Partial Dissent by Judge Pregerson

INGRAM, District Judge:

Northwest Environmental Advocates and Nina Bell (NWEA) appeal from the district court's judgment in favor of Portland on their claims that the City is violating the Clean Water Act (CWA).

On April 16, 1991, NWEA filed suit in the district court

alleging that Portland's practice of discharging raw sewage during times of precipitation from 54 outfall points was not covered by a permit and that the practice had caused and was continuing to cause violations of Oregon's water quality standards. After a trial on the written record, the district court held that 1) the contested discharge points were covered by Portland's pollution permit, and 2) the court lacked jurisdiction to consider NWEA's water quality violation claims. We AFFIRM both holdings.

I. BACKGROUND

A. THE PORTLAND SEWAGE TREATMENT SYSTEM

At issue is the operation of the Portland sewer system. Portland operates a sewage treatment system that includes a network of combined sewage and stormwater pipes. Although the construction of these combined sewer pipes was discontinued in 1962, approximately 70% of the City's sewers remain combined sewers. Supp. E.R. 21. The effluent flowing in the system ideally is intercepted and transported to the Columbia Boulevard Treatment Plant where it is treated and then discharged into the Columbia River through two outfalls (Nos. 001 and 002). The interceptors can carry only "'three times [the] average dry weather flow'" of effluent to the treatment plant. Sunnarborg Aff., Supp. E.R. 21. When the flow exceeds the plant's capacity, as can occur during periods of precipitation, the effluent is released untreated through a system of combined sewer overflow (CSO) outfalls in what is termed a CSO event. There are between 50 and 80 CSO events every year in Portland. E.R. 216; *see also* Bureau of Environmental Services, City of Portland, *Columbia*

Slough Planning Study Background Report (1989) (there are between 67 and 79 CSO events per year in the Columbia Slough).

Portland has 54 CSO outfalls; 12 drain into the Columbia Slough and 42 drain into the Willamette River. These waterways and their environs are used by Portland residents for recreation, including water contact activities such as boating. The release of untreated sewage into such public waters can present health risks. *See* National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37370, 37371 (1989) ("CSOs have been shown to have severe adverse impacts on human health under certain conditions."). Appellants have supplied both anecdotal and scientific evidence of the polluted nature of the Willamette River and the Columbia Slough, especially during and immediately after CSO events. *See, e.g.*, Portland's Response to NWEA's Interrogatories, E.R. 119; Thutt Aff., E.R. 159-178; Pratt Aff., E.R. 20.

Abatement of CSO events is not easy. It has been estimated that to solve the problem in Portland alone will cost between $500 million and $1.2 billion dollars. E.R. 221. Estimates for the entire nation are between $70 billion and $109 billion dollars. *Environmental Groups Call for Effort to Deal with Combined Sewer Problems,* 23 Env. Rptr. (BNA) 13 (1992) (upgrades could start at between $70 and $80 billion dollars); *Combined Sewer Overflow Problems Demand New Approach, Local Officials Say,* 20 Env. Rptr. (BNA) 1939 (1990) (costs could be as high as $109 billion).

B. PROCEEDINGS IN THE DISTRICT COURT

On February 1, 1991 NWEA gave written notice to Portland, the EPA Administrator, the State of Oregon, and the EPA Regional Administrator of its intent to file suit in the district court challenging the legality of the CSO discharges. Complaint, E.R. 9. In April 1991, after the required 60 day notice period, NWEA filed this action.

The crux of the NWEA complaint was that the 54 CSO outfalls being used regularly by the City were not covered by the City's 1984 National Pollution Discharge Elimination System (NPDES) permit. Because unpermitted discharges of pollutants are illegal, NWEA argued the City was violating the CWA. Even if the CSOs were covered by the permit, NWEA argued that the discharges violated Oregon water quality standards and therefore violated a condition of the Permit. These violations were ongoing and likely to continue. NWEA prayed for injunctive relief and civil penalties. Complaint, E.R. 10-11.

The 1984 permit was to expire in July 1989. However it remained in effect until Portland and the Oregon Department of Environmental Quality (DEQ)[1] were able to complete the renewal process and agree on the terms of a new permit. DEQ forwarded a draft of a proposed renewal permit to Portland in December 1990. This draft permit required the City to "meet water quality standards at all discharge points, including CSOs,. . ." Appellee's Brief at

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[1]National Pollution Elimination Discharge Permits in Oregon are issued by DEQ.

11. Because Portland could not meet the five year time table set forth in the proposed renewal permit, *id.*, the parties determined that a compliance order separate from the renewal permit, and requiring eventual abatement of all CSO events, was appropriate. After a period of Notice and Comment, Portland and the DEQ came to an agreement in August 1991. Under that settlement, Portland's new permit specifically listed the CSOs as permitted discharge points. In addition to the permit, the parties entered into a stipulation and final order (SFO) in which Portland agreed to replace the CSO system within the next 20 years.

Once these negotiations had been completed, Portland filed a motion to dismiss and the parties filed cross-motions for summary judgment. The court bifurcated the proceedings; first it would address whether Portland could be held liable for violations of the CWA, and then if necessary, determine whether violations had occurred and impose any necessary penalties. The parties stipulated to a trial of the liability phase on the summary judgment submissions, allowing the court to decide questions of fact as well as questions of law. Amended Opinion, E.R. 73.

After reviewing the submissions the district court issued an opinion and judgment. It later filed an amended opinion which was essentially the same as the original. The court found that Portland's 54 CSOs were covered by the 1984 NPDES permit, and thus that the City was not in violation of the Act for allowing unpermitted discharges. It also rejected NWEA's claim that Portland would nonetheless be liable for violating Oregon's water quality standards because the CWA did not confer federal jurisdiction to entertain citizen suits to enforce state water quality

standards.

II. ANALYSIS

A. DOES THE 1984 PERMIT COVER THE CSOs?

In the court below, NWEA argued that Portland had violated and continued to violate the CWA by discharging through unpermitted outfalls. The district court found otherwise, holding that the relevant NPDES discharge permit authorized CSO events under specific circumstances. NWEA asserts that the district court erred in so interpreting the permit.

We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other legal document. When reviewing a district court's interpretation of such a writing, the court reviews *de novo* the determination of whether it is ambiguous. *In re U.S. Fin. Sec. Litig.*, 729 F.2d 628, 632 (9th Cir. 1984). Interpretation of an unambiguous writing is also a question of law subject to *de novo* review. *Culinary & Service Employees Union, Local 555 v. Hawaii Employee Ben. Admin. Inc.*, 688 F.2d 1228, 1230 (9th Cir. 1982). If the court must look to extrinsic evidence in order to interpret a writing, its findings of fact are reviewed for clear error. *U.S. Fin. Sec.*, 729 F.2d at 632; *Culinary & Service Employees Union*, 688 F.2d at 1230; *In re Agricultural Research & Technology Group, Inc.*, 916 F.2d 528, 537 (9th Cir. 1990).

NWEA argued in the court below that the 1984 permit covered only two point sources, outfalls 001 and 002 from the

treatment plant.[2]

The 1984 permit expressly "covers" only two point sources, outfalls 001 and 002 from the treatment plant. These outfalls are listed on the first page of the permit as the "SOURCES COVERED BY THIS PERMIT." E.R. 222. The 54 CSOs are not listed in this section. The first page of the permit also states that the receiving waterway for these discharges is the Columbia River. The Willamette River and the Columbia Slough are not mentioned.

Immediately below the section listing "SOURCES COVERED," the permit provides a description of the activities that are covered by the permit. This section, "PERMITTED ACTIVITIES," states that Portland is authorized to "operate a waste water collection, treatment, control and disposal system and discharge to public waters adequately treated waste waters only from the authorized discharge point *or points established in Schedule A . . . .*" E.R. 222 (emphasis added). Schedule A provides the effluent limitations for outfalls 001 and 002. More importantly, however, it provides that:

The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water

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[2]Effluent from outfalls 001 and 002 has been treated before it is discharged into the Columbia River.

recreation season (June 1 to October 31).[3] E.R. 223. Thus, on the face of the permit it appears that CSO events were considered to be a "permitted activity." Finally, Schedule C provides that the City must "continue to work toward the separation of sanitary sewage and storm water in presently developed areas in which this method is cost effective." E.R. 224.

NWEA contends that the court should only heed the first portion of the permit listing covered sources.[4] Because the CSOs are not specifically listed on page one as permitted sources, NWEA argues, they must not have been encompassed by the permit and are therefore illegal. To follow this reasoning would require the court to read the references to diversion structures out of the permit

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[3]The parties do not dispute that "diversion structure" refers to the CSOS.

In earlier permits, the 54 CSOs were listed in this provision of the permit. *See* Supp. E.R. 13 (1979) permit, "Discharge at overflow points 003 through 066 is permitted when the flow at diversion structures exceeds three times the dry weather flow."); Supp. E.R. 2 (1974 permit - same).

[4]NWEA attempts to downplay the importance and placement of the references to diversion structures, implying that they are somehow a part of the fine print. In reality however, the limitations on the frequency of CSO events appears in normal sized type on page two of the permit, directly below the effluent limits for discharges from outfalls 001 and 002. *See,* E.R. 223

altogether. The limitations on the frequency of CSO events and the requirement that Portland work towards upgrading its sewer system would then constitute mere surplusage.

The 1984 permit is clear on its face in permitting CSO events under specified conditions. The description of permitted activities specifically allows Portland to operate a sewage system and to discharge through two separate sets of discharge points, those listed on page one as authorized discharge points, and those described and listed in Schedule A.

The extrinsic evidence presented to the district court only strengthens this conclusion. The parties each offered evidence, in the form of affidavits and other documentary evidence, to support their respective understandings of the 1984 permit. NWEA relied mainly on four documents to support the position that the CSOs were not, and had never been, permitted. The first was a letter from W.C. Gaffi, Portland's Chief Engineer, to DEQ in 1988. Gaffi stated that "[t]he City supports ODEQ's position to permit the CSO outfalls through a modification to the existing treatment permit. This approach should achieve the same goal as individual CSO permits and reduce the administrative cost of doing so." E.R. 278. The second document was an October 1990 memorandum from two members of the Portland Bureau of Environmental Services. In this memo, Linda MacPherson and Dave Kliewer indicated the need to set up a "discussion to determine if the CSOs are going to be permitted or not?" E.R. 279. The third is an undated memorandum in which a DEQ employee wrote that "[t]he potential exists for permitting both the storm and combined sewer discharges" E.R. 191.

NWEA argues that these three documents imply that the CSOs were not covered under the 1984 permit, because if they were, there would be no need to address including them in future permits.

Finally, NWEA offered a DEQ policy statement entitled "Strategy for Regulating Combined Sewer Overflows."[5] The report states that "[n]one of these outfalls [the CSOs] are covered by a permit, however, all are proposed to be addressed in the Portland-Columbia Blvd STP permit renewal." E.R. 208.

NWEA argues that this statement proves that DEQ had not permitted the CSOs in the 1984 permit. Portland, however, offered an affidavit by the author of the report to explain the statement. Barbara Burton explained that the quoted text did not mean that Portland's CSOs were not covered by an NPDES permit, and therefore were illegal. Instead, it was intended to convey that "none of the outfalls were individually *listed* with effluent limitations in Portland's 1984 NPDES permit. E.R. 281 (emphasis in original).

Barbara Burton's impression of the scope of the Portland NPDES permit was shared by Harold L Sawyer, formerly the Water Quality Division Administrator for DEQ. E.R. 282. Sawyer stated in his affidavit that "Portland's entire

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[5]This February 1991 document appears to have been prepared in response to the EPA's National Combined Sewer Overflow Control Strategy. *See* 54 Fed. Reg. 37370 (Sept. 8, 1989).

sewer system, including CSO outfalls, was permitted by Portland's 1984 NPDES permit and by its prior NPDES permits." E.R. 283. According to Sawyer, DEQ knew, and always had known, that the Portland sewer system operated through a system of CSOs and treatment plants. *Id.* Moreover, "[i]f DEQ had considered combined sewer overflows to be outside of Portland's NPDES permit, as Water Quality Division Administrator for DEQ [he] would have proposed a specific program and schedule for treatment or elimination of such discharges for incorporation in the permit or in a separate compliance order." *Id.* These are the steps that DEQ took in 1991. Thus, "DEQ understood that Portland would continue to operate its combined sewer system as it had been operating the system prior to the existence of the NPDES permitting program, to prevent dry weather combined sewer overflows except during abnormal storm events." *Id.* at 285.

This position is repeated in the 1991 SFO. DEQ stated that "as a matter of policy the Department [DEQ] did not always list CSO discharge points in an NPDES permit but, in many instances, issued permits for an entire sewer system . . . [Portland's] 1984 NPDES permit is a permit for the sewer system, which includes CSO outfalls, but did not contain specific effluent limitations for CSOs." E.R. 260-61.

The district court, having reviewed these conflicting statements, found Portland's interpretation to be persuasive. The court recognized the import of the Gaffi letter, but determined that it was "not persuasive enough in the face of the common sense reading of the permit, which when examined in context with the older permits and when

construed to give the language limiting discharges meaning, directs a conclusion that the 1984 permit covered the CSO discharges." E.R. 83. The Sawyer and Burton affidavits were more persuasive because their explanations of the 1984 permit comported with the language of the permit itself. *Id.*

NWEA argues that, notwithstanding the extrinsic evidence, under the rules of contract interpretation the court must find that the CSOs were not covered by the 1984 permit. Courts should, if possible, interpret a contract so that its terms will not be illegal. *See Corbin, Contracts* § 546 at 169 (1960). This rule is advisory and should not be applied blindly to the detriment of the parties' intentions. "[A] specific provision in an otherwise valid contract should not be given a meaning that would have a legal effect that the court is convinced the parties did not intend, even though any alternative meaning will cause the provision to have no legal effect whatever." *Id.*

Under the regulations promulgated pursuant to § 1342 of the Clean Water Act, all NPDES permits should establish technology-based effluent limitations for all permitted point sources. 40 C.F.R. 122.44(a). Although technically the permit should have established effluent limitations for the CSOs, it appears that the parties intended to omit such requirements. The district court was presented with sufficient evidence from which it could determine that DEQ, as well as Portland, intended this allegedly unlawful interpretation. EPA approved the terms of the permit, including the absence of effluent limitations for the CSOs, even though the existence of the CSOs was clear on the permit's face. Moreover, prior to 1989, it appears that

many state permitting bodies believed that CSO outfalls could be permitted without being subjected to effluent limitations. *See National Combined Sewer Overflow Control Strategy*, 54 Fed. Reg. 37370, 37371 (1989) (proposed regulations to "control effluents from combined systems which are not regulated under the sanitary system standards nor as discharges from separate storm sewer regulations"). *Cf., Montgomery Environmental Coalition v. Costle,* 646 F.2d 568, 592 (D.C. Cir 1980) (interpreting permit as allowing limited CSO events without effluent limitations).

NWEA next argues that the district court erred by failing to interpret the permit in the public interest. This is "a rule of construction rather than one of interpretation, one that for reasons of public policy requires the court to give to a contract that legal operation that is of public advantage, when a choice between that and a less advantageous operation is reasonably open." Corbin, *supra* § 550 at 196. In NWEA's view, the 1984 permit should be interpreted as not allowing the CSOs because "[c]learly it is not in the public interest to construe a permit so as to authorize the gross pollution of public waterways." Reply at 7. The alternative to the CSOs is a total revamping of the Portland sewer system, the cost of which has been estimated at as much as 1.2 billion dollars. E.R. 221. Moreover, until such renovations could be completed, if the excess effluent during storms was not released through the CSOs the effluent would "flood[ ] streets and basements." Sunnarborg Aff., Supp. E.R. 21. Although water pollution is unfortunate, it beggars credulity to argue that this alternative is so clearly more in the public interest than the CSO events.

The district court's findings are not clearly erroneous. There was significant evidence from DEQ, the permit author, to indicate that the CSOs were covered in the 1984 permit. Moreover, DEQ's interpretation, that the CSOs were permitted but not separately listed, does not directly conflict with NWEA's offered extrinsic evidence. Given Sawyer's and Burton's explanations, Gaffi and MacPhearson's concerns about permitting the CSOs can be explained as concern over whether the CSOs should be expressly listed on new permits.

We, accordingly, affirm the district court's finding that the permit authorized limited discharges from the CSOs.

B. DOES NWEA HAVE A CAUSE OF ACTION FOR WATER QUALITY VIOLATIONS?

NWEA argues that the district court erred in finding that it did not have jurisdiction over a citizen suit for the enforcement of the water quality maintenance provision of the NPDES permit.

In the court below NWEA argued that, whether or not the CSOs were specifically permitted under the 1984 NPDES permit, Portland had violated and continued to violate conditions of both the 1984 and 1991 NPDES permits. Specifically, NWEA alleged that Portland's CSO events violated a permit condition prohibiting any discharges that would violate Oregon water quality standards. The 1984 permit held, as a condition in Schedule A, that "[n]otwithstanding the effluent limitations established by the permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality

Standards as adopted in OAR 340-41-445 except in the following defined mixing zone . . . " 1984 Permit, E.R. 223. The mixing zone was defined as a 100 foot radius around the discharge point. *Id.* The 1991 permit contained similar limitations but eliminated the mixing zone provision. It also expressly applied the condition to the CSOs. *See* E.R. 235 *and compare with* E.R. 223. NWEA offered declarations and scientific reports that it argued establish continuing violations of the water quality standards in the waters surrounding the CSOs after CSO events. *See, e.g.,* Portland's Response to Interrogatories, E.R. 119 (failure to meet fecal coliform standards); Thutt Aff., E.R. 164 ("not possible to have any CSO event that would not exceed the DEQ's fecal coliform standard"); Rosolie Aff., E.R. 153-54.

The district court never reached the question of Portland's liability for violations of this permit condition. Instead, the court held that the Act did not grant federal jurisdiction for the citizen enforcement of water quality violations, "because water quality standards do not equal 'effluent standards or limitations under this chapter.'" E.R. 84. A general water quality maintenance condition like the one found in the 1984 and 1991 permits is not the type of "condition" that the court found would trigger federal jurisdiction. Instead, "[g]iven the distinction between effluent limitations and water quality standards, . . . and the problems with analyzing violations of water quality standards as opposed to effluent limitations, . . . state water quality standards can constitute effluent standards, violations of which may be actionable in a citizen suit, only if they are incorporated into an NPDES permit through effluent limitations." E.R. 86. Because the water quality

standards in this case had not been translated into end-of-the-pipe discharge limitations, NWEA was not authorized to bring suit. Finally, the district court stated that to allow enforcement of the standards would be "nonsensical" because it would permit discharges from CSOs in Schedule A while simultaneously prohibiting them. *Id.*

NWEA argues that the district court erred in finding that the provisions of the CWA do not authorize federal jurisdiction for citizen suits to enforce water quality conditions of NPDES permits. Whether expressly stated permit conditions prohibiting discharges that cause water quality violations are enforceable by citizens is a question of first impression in the courts of appeals. We review the district court's interpretation of the statute *de novo*.

The City of Portland correctly points out that the authorities generally reject citizen suit standing to enforce water quality standards. *See Oregon Natural Resources Council v. United States Forest Service,* 834 F.2d 842, 850 (9th Cir. 1987); *New York v. United States,* 620 F.Supp. 374 (E.D.N.Y. 1985); *McClellan Ecological Seepage Situation (MESS) v. Weinberger,* 707 F. Supp. 1182, 1200 (E.D. Cal. 1988). *But see McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431, 443 (E.D. Cal. 1989); *MESS,* 707 F.Supp. at 1203. We have said "it is not the water quality standards themselves that are enforceable in section 1311(b) (1) (C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards." *Oregon Natural Resources Council,* 834 F.2d at 850; ree *also MESS,* 707 F.Supp. at 1200 ('[I]f a state water quality standard has not been incorporated into an NPDES permit *through an effluent*

limitation, it is outside the scope of section 301(b)(1)(C).") (emphasis added). All of these statements are either in cases distinguishable from the one before us or are dicta. Nevertheless, they do show that whenever courts have been faced with the question, the answer has been that citizen suits cannot be used to enforce water quality standards. The plaintiffs have not cited any authority to us on the other side.[6] They have not been able to find a single case in which a court held that citizen suits could be used to enforce water quality standards, whether the water quality standards were incorporated in a NPDES permit or not.

The starting point for determining whether the CWA provides federal jurisdication for citizen suits attempting to enforce water quality standards must be the statute itself, both the provisions governing citizen suits and those governing the establishment of water quality standards.

Every state is required to promulgate water quality standards. 33 U.S.C § 1313 (a). These standards are then reviewed and either accepted or rejected by the EPA Administrator. *Id.* If it is determined that water quality cannot be maintained or achieved under the normal effluent limitations, the Act authorizes the imposition of stricter

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[6]In *Montgomery Enviromental Coalition v. Fri*, 366 F.Supp. 261, 265 (D. D.C. 1973). the court held that water quality standards were enforceable in ctizens suits, at least until effluents under the Act had been promulgated. However, the court later reversed itself. *See Montgomery Enviromental Coalition v. Washington Suburban Sanitary Commission,* 607 F.2d 378, 381 (D.C. Cir. 1979).

effluent limitations in order to attain and maintain water quality.[7] 33 U.S.C. § 1312; 33 U.S.C. § 1311(b)(1C) (requiring by 1977 any more stringent standard for effluent limitations necessary to meet water quality standards); 40 C.F.R. § 122.44(d)(1)(iii) (requiring stricter effluent limits when necessary to avoid "an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant."); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 1972 U.S.C.C.A.N. 3668, 3712-13 *(hereinafter 1972* U.S.C.C.A.N.); 54 Fed. Reg. 37370, 37373 (Sept. 8, 1990). ("Permits must be written to ensure CSO discharges do not cause violations of water quality standards.").

Federal jurisdiction over citizen suits to enforce the Clean Water Act is authorized in 33 U.S.C. § 1365 (CWA § 505). Section 1365 authorizes private citizens to bring suit in the district court "(1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter 33 U.S.C. § 1365(a) (1) . . . Section 1365(f) states:

> For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3)

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[7]In this case, DEQ did not translate the relevant water quality criteria into effluent discharge limitations.

standard or performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

Reading the statute in context, reveals the following structure:

> § 1365(a) allows citizen suits to enforce effluent limitations;
>
> § 1365(f) defines effluent limitations as end-of-pipe limitations and permit violations;
>
> § 1311 et seq. establish a NPDES permit system to require end-of-pipe effluent limitations tailored to achieve water quality standards.

33 U.S.C. § 1342 sets out the requirements for issuance of NPDES permits. Section 1342 allows NPDES permits to be issued which "apply, and insure compliance with, any applicable requirements of 33 U.S.C. §§ 1311, 1312, 1316, 1317, and 1343," as well as 33 U.S.C. § 1318. 33 U.S.C. §§ 1342(b)(1)(C) and 1342(b)(2)(A). These sections require, inter alia, that pollutant discharges meet effluent-limitations calculated to achieve water quality standards. *See* 33 U.S.C. §§ 1311(b)(1)(C) and 1312(a). None of these sections, however, require that a *permittee* directly comply with water quality standards. Rather, it is the duty

of the *permit-issuing authority* to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met. *See Oregon Natural Resources Council v. United States Forest Service,* 834 F.2d 842, 850 (9th Cir. 1987).

The permit at issue in the instant case fails to set out such limitations as to the CSOs. Since plaintiffs in the instant case have not alleged violations of end-of-pipe effluent limitations or of any other permit conditions contemplated by 33 U.S.C. § 1342, they lack standing to sue under 33 U.S.C. § 1365.

The cases that have found standing to enforce reporting requirements of NPDES permits are distinguishable from the instant case because permits are required to include reporting requirements pursuant to 33 U.S.C. §§ 1342 and 1318. *See, e.g., Sierra Club v. Simkins Industries, Inc.,* 847 F.2d 1109, 1115 n.9 (4th Cir. 1988) ("the reporting requirements of the Act and Simkins' NPDES permit are essential elements of the Clean Water Act's enforcement procedures"); see also *Menzel v. County Utilities Corp.*, 712 F.2d 91 (4th Cir. 1983).

A careful reading of the legislative history provides evidence supporting both NWEA's and the district court's interpretation of § 1365. As NWEA points out, in explanation the meaning of § 1365(f), the Senate Committee on Public Works implied that there were *no* limits on the types of permit conditions that would be enforceable. "In addition to violations of section 301(A) citizens are granted authority to bring enforcement actions for violations of . . . any condition of any permit issued

under section 402." 1972 U.S.C.C.A.N. at 3747. This broad statement does not exist in a vacuum however. For instance, earlier in the same document, a more limited statement of the scope of citizen enforcement was made. There the Comniittee stated that citizens could bring enforcement actions "against those who violate effluent standards or compliance orders." *Id.* 3677. No mention is made of general water quality conditions.

Moreover, when the broad statement of jurisdiction is read in conjunction with the balance of the legislative history, the backdrop of the 1972 Amendments and the practical considerations surrounding cases of this sort, it becomes clear that Congress did not intend such a limitless grant of jurisdiction when it enacted § 1365(f)(6).

The 1972 Amendments to the Clean Water Act reflect a 180 degree shift in the governments' attempts to control water pollution. Prior to 1972, the Federal Water Pollution Control Act approached the job of protecting and preserving the nation's waters through a program of establishing and enforcing water quality standards. Under the pre-1972 legislation, the federal government was authorized to bring enforcement actions whenever it determined that these standards were being violated. Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act,* 36 Vand. L. Rev. 1167, 1178 (1983). This approach was soon found wanting. Enforcement of the standards was almost non-existent. *Id.* at 1179 (only one enforcement action brought before 1972).

There were philosophical dfficulties with this approach

which approved of pollution up until the point that it caused damage. The Amendments took the position that all discharges were impermissible unless specific authorization, through the discharge permit system, was granted. Whereas earlier legislation focused on the quality of the receiving waters, the 1972 Amendments focused on the quality and nature of the effluent being discharged into those waters, with a goal of reducing and eventually eliminating all discharges.

This change in emphasis to an act geared towards discharge limits is reflected throughout the legislative history. *See, e.g.,* 1972 U.S.C.C.A.N. 3675 ("The legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits."). Although the 1972 Amendments retain some role for water quality standards, *see* 33 U.S.C. §§ 1312 and 1313, that role has changed. Prior to 1972, water quality standards served as both the end goal and the mechanism for achieving that goal. Under the 1972 Amendments, water quality standards remain the goal, however discharge limits have taken over as the mechanism. *See* 1972 U.S.C.C.A.N. 3675 ("the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement"). Thus "[t]he new law must build upon the existing foundation of water quality standards and employ effluent limitations as a tool for the achievement of those standards." Hearings on H. R. 11896, Before the Comm. on Public Works, 93d Cong. lst Sess. 1180 (1972) (statement of Hon. William D. Ruckleshaus,

Admin., Environmenml Protection Agency), *reprinted in 1* A Legislative History of the Water Pollution Control Act Amendments of 1972 at 1180 *(1972) (hereinafter Legislative History); see also* Sen. Consideration of the Report of the Conference Committee, *reprinted in Legislative History* at 171 (statement of Sen. Muskie) ("To the extent the State may wish to continue an examination of water quality in order to determine if more restrictive effluent limits may be required, this section [1313] will be useful."); 33 U.S.C. § 1312; 1972 U.S.C.C.A.N. 3710 ("the Administrator is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability."); *id.* ("It is not the intent of the committee to in any way restrict the Administrator, or the States from applying higher levels of control than best practicable where necessary to achieve standards established pursuant to the 1965 Act . . ."); *id.* at 3712 ("To the extent that water quality standards can be used to generate firm data on necessary effluent-limitations this enforcement tool should be available.").

Congress also emphasized the primacy of discharge limits. For instance Congressman Harsha of Ohio stated during consideration of the conference committee bill that "those individuals were wrong who stated that this [§ 1313] was intended to be a weakening of the effluent limitations approach and a continuation of the old water quality standard based approach to water quality control which did not prove as effective as it could have been." House Consideration of the Rept. of the Conf. Comm. *reprinted in Legislative History* at 246. In fact, to the extent that the EPA's resources required prioritizing, Congress stated that

it "should assign secondary priority to this [§ 1313] provision." Sen. Consideration of the Report of the Conference Committee, *reprinted in Legislative History* at 171 (statement of Sen. Muskie).

The Amendments also ameliorated evidentiary and enforcement problems that were inherent in the earlier legislation. The pre-1972 Act required the government to prove that the defendant's discharges were the cause of water quality violations in receiving waters that might be subject to more than one discharger. *See Gaba, supra* at 1179. With discharge limitations, a more objective task was given to the courts. Now in order for a court to determine liability, it need only compare the quality and quantity of the alleged polluter's discharge to the limits set forth in the applicable NPDES permit. If the discharges exceed the permit limits, the discharger has violated the Act; if they do not, there is no violation or liability. Thus, "[a]n alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore an objective evidentiary standard will have to be met by any citizen who brings an action under this section." 1972 U.S.C.C.A.N. at 3745. The enforcement of a general water quality maintenance condition in a permit, however, would require the court to engage in just the subjective analysis of technological considerations that Congress sought to avoid under § 1365. Congress's emphasis on the evidentiary simplicity of enforcement actions precludes the enforcement of water quality standards that have not been translated into effluent

discharge limitations. Practical considerations also militate in favor of an interptetation that does not allow for jurisdiction in this case. Under a water quality based enforcement scheme such as the pre-1972 Act, dischargers faced problems in planning and regulating the legality of their actions because this legality is dependent on natural conditions such as the weather and third parties' discharges. *See* Rodgers at 250. As a practical matter, NWEA's interpretation of § 1365 places dischargers such as the City in the same untenable pre-1972 position. No matter how much planning the City were to engage in, as long as it discharges effluent from the CSOs even under the auspices of a duly authorized permit, it is in danger of being in violation of the Act. Given the extreme cost of pollution abatement, industry and cities must have the ability to plan for the future with the assurance that if they remain within concrete permit parameters, they will remain on the correct side of the law.

Congress's statements in the legislative history that liability determinations under the 1972 amendments would be objective and non-technical, as well as the emphasis on the translation of water quality standards into discharge limitations convinces this court that the single reference to "any condition of any permit" cannot be read as broadly as NWEA suggests without eviscerating Congress's intent to restructure and revamp the statute. Citizens may still object in the state courts to the terms of a proposed NPDES permit when it is issued if they find that the effluent limitations are insufficient to protect and preserve water quality. ORS 183 484(2)(challenge to permit contents must be brought within 60 days of issuance). Given the legislative history and the practical problems that NWEA's

interpretation of the statute would entail, the court finds that under 33 U.S.C. § 1365, water quality standards are unenforceable by way of a citizen suit unless they have been translated into end-of-the-pipe effluent limitations. Therefore, the district court's holding is affirmed.

C. PROCEDURAL DETERMINATIONS

In the court below, Portland asserted two other jurisdictional arguments upon which NWEA now seeks a determination. Portland argued that 1) the case was moot because of the changes in the 1991 permit; and 2) any action was barred under 33 U.S.C. § 1319(g)(6) by DEQ's subsequent enforcement actions. Because NWEA claims entitlement to attorney's fees based on thealleged violations of the old permit, and seeks to enforce the water quality standards independently of the effluent limitations, a live and genuine controversy remains, so the case is not moot.

III. CONCLUSION

We AFFIRM the district court's holdings that the 1984 permit covered the CSOs and that 33 U.S.C. § 1365(a) does not confer jurisdiction for citizen suits to enforce water quality standards when they are conditions of a permit. Accordingly we decline to reach the questions of mootness and whether 33 U.S.C. § 1319 bars jurisdiction.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I concur in all parts of the majority opinion except the

finding that Northwest Environmental Advocates ("NWEA") lacks standing to bring a citizen suit under the Clean Water Act ("CWA") § 505(a)(1) [33 U.S.C. § 1365(a)(1)], to enforce water quality standards contained in NPDES permits. Portland holds an NPDES permit, and the water quality standards are conditions of its permit. Both the plain language of § 1365(a)(1) and case law support a finding of citizen suit jurisdiction in this case, and I am unpersuaded by the majority opinion's reasoning that legislative history and practical considerations preclude jurisdiction. I therefore respectfully dissent.

As the majority opinion points out, the plain language of § 1365(a) authorizes citizens to enforce *all* permit conditions. That section provides: "[A]ny citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violaiton of (A) an effluent standard or limitation under [the Clean Water Act]. . . ." 33 U.S.C. § 1365(a)(1)(A). An effluent standard or limitation includes "(2) an effluent limitation or other limitation under section 1311 . . . or (6) a permit or condition thereof. . . ." 33 U.S.C. § 1365(f)(2), (f)(6) (emphasis added). Although this language clearly contemplates citizen suits to enforce "a permit or condition thereof," the majority opinion concludes that the section allows citizens to enforce only those water quality standards that are translated into permit effluent limitations.

To reach what I regard as an erroneous conclusion, the majority opinion, I believe, misconstrues the effect of the legislative history of the 1972 amendments to the CWA. I agree that the 1972 CWA amendments reflect Congress' dissatisfaction with the system of water quality standards,

but nowhere does Congress evidence an intent to *preclude* the enforcement of water quality standards that have not been translated into effluent discharge limitations. The fact that Congress created a new, simpler enforcement method based on effluent limitations does not mean that Congress intended to foreclose citizen suit enforcement of water quality standards. In fact, the legislative history convinces me of just the opposite.

By introducing effluent limitations into the CWA scheme, Congress intended to improve enforcement, not to supplant the old system. In the legislative history, the Senate Committee first outlined the dual purposes of water quality standards: "The standards are intended to function . . . [a]s a measure of performance . . . [and] to provide an avenue of legal action against polluters. If the wastes discharged by polluters reduce water quality below the standards, actions may be begun against the polluters." S. Rep. No. 414, 92nd Cong., 2nd Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671; 40 C.F.R. § 131.2 (1992) (dual purposes). Next, the Committee expressed dismay over the "almost total lack of enforcement" under the old system that depended exclusively upon water quality standards. 1972 U.S.C.C.A.N. at 3672 ("[O]nly one case has reached the courts in more than two decades."). Given Congress' concern about *non*-enforcement, the majority opinion is incorrect when it takes a narrow view of Congress' broad provision for "citizen participation in the enforcement of control requirements and regulations established under [the CWA] . . . ." *Id.* at 3745.

Moreover, citizen suit enforcement of water quality standards is necessary to complement enforcement of

effluent limitations. Water qualtiy standards "often cannot be translated into effluent limitations. . . ." *Id.* at 3675. For example, certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids). *See* Or. Admin. R. 340-41-445(2)(f), (l), (k). Even after the 1972 amendments, states may adopt similar standards and express water quality criteria "as constituent concentrations, levels, or narrative statements. . . ." 40 C.F.R. 131.3(b)(1992).

Many discharges remain unregulated and primarily subject to water quality standards, despite statutory deadlines for achieving effluent limitations, 33 U.S.C. § 1311(b)(1)(A) (1977 deadline for first-stage effluent limitations on all point source discharges), § 1311 (b)(2) (West 1993 Supp.) (1989 deadline for second-stage, more stringent controls). Futhermore, in cases where effluent limitations do apply, they serve only as national, minimum requirements; states may adopt stricter, enforceable water quality standards and limitations. 33 U.S.C. § 1370.

By interpreting § 1365(a)(1) to exclude citizen suit enforcement of water qaulity standards that are not translated into quantitative limitations, the majority opinion immunizes the entire body of qualitative regulations from an important enforcement tool.[1] The rule is especially

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[1]Also, the majority opinion's interpretation effectively attributes to Congress an intent to stall citizen suit enforcement of permit terms that specify water quality

troubling in this case, because no effluent limitations cover the discharges from Portland's combined sewer overflows ("CSOs"). Nor can citizens find consolation in their state court remedy of objecting to the contents of a permit within sixty days of its issuance, Or. Rev. Stat. 183 484(2). Citizens groups such as NWEA might not wish to dispute the issuance or contents of a permit, but to enforce the permit's terms. The majority opinion precludes them from doing so. Qualitative standards are not too difficult for courts to enforce. The majority's decision eliminates the *only* practicable way for citizens to challenge CSO discharges.

The legislative history of the amendments neither dictates nor supports this result. In fact, parts of the legislative history reflect Congress' intention to grant *broad* authority for citizen enforcement, consistent with the statutory language. In the legislative history, the Senate Committee expressly stated that "*[i]n addition to violations of section 301(a)* [26 U.S.C. § 1311, Effluent Limintations] citizens are granted authority to bring enforcement actions for violations of . . . *any condition of any permit* issued under section 402 [26 U.S.C. § 1342]." 1972 U.S.C.C.A.N. at 3747 (emphasis added). Also, the Committee explained that it modeled the citizen suit provision on the analogous

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standards. Congress set deadlines for promulgation of effluent limitations, and therefore, must have anticipated a five-year lag, 1972-1977, before universal applicability of effluent limitations. Nothing in the legislative history indicates that Congress intended to stall citizen enforcement of permit terms until promulgation of effluent limitations.

Clean Air Act ("CAA") provision that applies to air pollution permit conditions.[2] *Id.* at 3745.

Finally, the majority opinion overlooks ample case law that supports a finding of citizen suit jurisdiction in this case. The Supreme Court has acknowledged citizen standing, under § 1365(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated effluent limitations and state-established standards. *See E.P.A. v. California*, 426 U.S. 200, 224-25, 96 S.Ct. 2022, 2033-34, 48 L.Ed.2d 578 (1976). By applying § 1365(f)(6), several courts have held that there is jurisdiction under which citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations. In fact, permit conditions that courts commonly enforce under § 1365(a) are not effluent limitations, but rather, requirements for retaining records of discharge sampling and for filing reports. *See, e.g., Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) ("Simkins' reporting requirements are expressly made conditons of its permit, and therefore violations of these conditions, by operation of § 1365(f)(6), are violations of an effluent standard or limitation of § 1365(a)."), *cert. denied,* 491 U.S. 904, 109 S.Ct. 3185,

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[2]The Clean Air Act ("CAA") provision authorizes citizen suits for alleged violations of "an emission standard or limitation under [CAA] . . . [,defined in relevant part as an] emission limitation, standard of performance or emission standard, . . . *or any condition or requirement of a permit* under . . . [sections of CAA] . . . or under an applicable [state] implementation plan." 42 U.S.C. § 7604(a), (f)(emphasis added).

105 L.Ed.2d 694 (1989). Other examples of enforceable permit conditions include conditions relating to sewage maintenance, *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980), *aff'd*, 644 F.2d 995 (3rd Cir. 1981), and construction schedules, *Locust Lane v. Swatara Township Auth.*, 636 F. Supp. 534, 539 (M.D. Pa. 1986) (rejecting defendant's attempt "to impose a limitation on § 1365 where one is neither supported by the language nor the legislative history"). Finally, citizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the CWA, namely discharges that may never reach navigable waters. *Connecticut Fund for Env't v. Raymark Indus., Inc.*, 631 F.Supp. 1283, 1285 (D. Conn. 1986).[3]

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[3]When this Court and other courts have held that citizens may not enforce water quality standards under § 1365(a)(1), they addressed standards that were *not included in a NPDES permit*. *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) (suit to enforce water quality standards allegedly breached by nonpoint sources, which are never regulated by NPDES permits); *McClellan Ecological Seepage v.Weinberger*, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988) (finding no citizen suit jurisdiction existed, because "a state water quality standard can constitute an effluent standard or limitation enforceable under section 505 only if it has been incorporated into an NPDES permit"); *Montgomery Envtl. Coalition Citizens Coordinating Comm. on Friendship Heights v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 381 (D.C. Cir. 1979).

Because the statutory language, legislative history, and case law demonstrate that citizens *have* authority to enforce permit conditions stated in terms of water quality standards, I would find the NWEA has standing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVRONMENTAL ADVOCATES, A Non-Profit Oregon Corporation; and NINA BELL, Plaintiffs-Appellants, v. CITY OF PORTLAND Defendant-Appellee.	) No. 92-35044) DC No.) CV 91-339-PA)))) ORDER AND) OPINION)

June 7, 1995

PREGERSON, Circuit Judge:

Northwest Environmental Advocates and Nina Bell ("NWEA") appeal the district court's judgment in favor of Portland on their claims that the City is violating the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq. On April 16, 1991, NWEA filed suit in the district court alleging that Portland's practice of discharging raw sewage during times of precipitation from 54 outfall points was not covered by a permit and that the practice had caused and was continuing to cause violations of Oregon's water quality standards. After a trial on the written record, the district court held that (1) the contested discharge points were covered by Portland's pollution permit, and (2) the court lacked jurisdiction to consider NWEA's water quality violation claims.

In *Northwest Environmental Advocates v. City of Portland*, 11 F.3d 900 (9th Cir. 1993) (Northwest), we affirmed. We

held that the contested discharge points were covered by Portland's pollution permit, *id.* at 903-06, and we held that Northwest Environmental Advocates lacked standing to bring a citizen suit under § 505(a)(1) of the Clean Water Act, 33 U.S.C.1365(a)(1), to enforce water quality standards contained in Portland's permit. *Id.* at 906-11. On December 28, 1993, NWEA filed a petition for rehearing with suggestion for rehearing en banc. While this petition was still pending, the Supreme Court decided PUD No. 1 of *Jefferson County v. Washington Department of Ecology,* 114 S. Ct. 1900 (1994) (Jefferson County).[1]

Jefferson County cast into considerable doubt our holding in *Northwest* that Citizens do not have standing under the Clean Water Act to enforce water quality standards unless they have been translated into end-of-pipe effluent limitations. In light of *Jefferson County* and upon reconsideration of our prior opinion in *Northwest*, we now vacate that opinion, 11 F.3d at 900-913, and issue the following opinion.

I. BACKGROUND

A. The Portland Sewage Treatment System

At issue is the operation of the Portland sewer system.

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[1] On April 25, 1994, the case failed to receive a majority of votes for consideration en banc. The panel then resumed control of the case. However, before the panel issued the final 5.4(b) Order, the Supreme Court decided *Jefferson County.*

Portland operates a sewage treatment system that includes a network of combined sewage and stormwater pipes. Although the construction of these combined sewer pipes was discontinued in 1962, approximately 70% of the City's sewers remain combined sewers. Supp. E.R. 21. The effluent flowing in the system ideally is intercepted and transported to the Columbia Boulevard Treatment Plant where it is treated and then discharged into the Columbia River through two outfalls (Nos. 001 and 002). The interceptors can carry only "'three times [the] average dry weather flow'" of effluent to the treatment plan. Sunnarborg Aff., Supp. E.R. 21. When the flow exceeds the plant's capacity, as can occur during periods of precipitation, the effluent is released untreated through a system of combined sewer overflow (CSO) outfalls in what is termed a CSO event. There are between 50 and 80 CSO events every year in Portland. E.R. 216; *see also* Bureau of Environmental Services, City of Portland, Columbia Slough Planning Study Background Report (1989) (there are between 67 and 79 CSO events per year in the Columbia Slough).

Portland has 54 CSO outfalls; 12 drain into the Columbia Slough and 42 drain into the Willamette River. These waterways and their environs are used by Portland residents for recreation, including water contact activities such as boating. The release of untreated sewage into such public waters can present health risks. *See National Combined Sewer Overflow Control Strategy*, 54 Fed. Reg. 37370, 37371 (1989) ("CSOs have been shown to have severe adverse impacts on human health under certain conditions."). Appellants have supplied both anecdotal and scientific evidence of the polluted nature of the Willamette

River and the Columbia Slough, especially during and immediately after CSO events. *See, e.g.*, Portland's Response to NWEA's Interrogatories, E.R. 119; Thutt Aff., E.R. 159-178; Pratt Aff., E.R. 20.

Abatement of CSO events is not easy. It has been estimated that to solve the problem in Portland alone will cost between $500 million and $1.2 billion dollars. E.R. 221. Estimates for the entire nation are between $70 billion and $109 billion dollars. Environmental Groups Call for Effort to Deal with Combined Sewer Problems, 23 Env. Rptr. (BNA) 13 (1992) (upgrades could start at between $70 and $80 billion dollars); Combined Sewer Overflow Problems Demand New Approach, Local Officials Say, 20 Env. Rptr. (BNA) 1939 (1990) (costs could be as high as $109 billion).

B. Proceedings in the District Court

On February 1, 1991 NWEA gave written notice to Portland, the EPA Administrator, the State of Oregon, and the EPA Regional Administrator of its intent to file suit in the district court challenging the legality of the CSO discharges. Complaint, E.R. 9. In April 1991, after the required 60 day notice period, NWEA filed this action.

The crux of the NWEA complaint was that the 54 CSO outfalls being used regularly by the City were not covered by the City's 1984 National Pollution Discharge Elimination System (NPDES) permit. Because unpermitted discharges of pollutants are illegal, NWEA argued the City was violating the CWA. Even if the CSOs were covered by the permit, NWEA argued that the discharges violated

Oregon water quality standards and therefore violated a condition of the Permit. These violations were ongoing and likely to continue. NWEA prayed for injunctive relief and civil penalties. Complaint, E.R. 10-11.

The 1984 permit was to expire in July 1989. However it remained in effect until Portland and the Oregon Department of Environmental Quality (DEQ)[2] were able to complete the renewal process and agree on the terms of a new permit. DEQ forwarded a draft of a proposed renewal permit to Portland in December 1990. This draft permit required the City to "meet water quality standards at all discharge points, including CSOs, ..." Because Portland could not meet the five year time table set forth in the proposed renewal permit, *id.*, the parties determined that a compliance order separate from the renewal permit, and requiring eventual abatement of all CSO events, was appropriate. After a period of Notice and Comment, Portland and the DEQ came to an agreement in August 1991. Under that settlement, Portland's new permit specifically listed the CSOs as permitted discharge points. In addition to the permit, the parties entered into a stipulation and final order (SFO) in which Portland agreed to replace the CSO system within the next 20 years.

Once these negotiations had been completed, Portland filed a motion to dismiss and the parties filed cross-motions for summary judgment. The court bifurcated the proceedings; first it would address whether Portland could be held liable

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[2]National Pollution Elimination Discharge Permits in Oregon are issued by DEQ.

for violations of the CWA, and then if necessary, determine whether violations had occurred and impose any necessary penalties. The parties stipulated to a trial of the liability phase on the summary judgment submissions, allowing the court to decide questions of fact as well as questions of law. Amended Opinion, E.R. 73.

After reviewing the submissions the district court issued an opinion and judgment. It later filed an amended opinion which was essentially the same as the original. The court found that Portland's 54 CSOs were covered by the 1984 NPDES permit, and thus that the City was not in violation of the Act for allowing unpermitted discharges. It also rejected NWEA's claim that Portland would nonetheless be liable for violating Oregon's water quality standards because the CWA did not confer federal jurisdiction to entertain citizen suits to enforce state water quality standards.

II. ANALYSIS

A. Does the 1984 Permit Cover the CSOs?

In the court below, NWEA argued that Portland had violated and continued to violate the CWA by discharging through unpermitted outfalls. The district court found otherwise, holding that the relevant NPDES discharge permit authorized CSO events under specific circumstances. NWEA asserts that the district court erred in so interpreting the permit.

We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other

legal document. When reviewing a district court's interpretation of such a writing, the court reviews *de novo* the determination of whether it is ambiguous. *In re U.S. Fin. Sec. Litig.*, 729 F.2d 628, 632 (9th Cir. 1984). Interpretation of an unambiguous writing is also a question of law subject to *de novo* review. *Culinary & Service Employees Union, Local 555 v. Hawaii Employee Ben. Admin. Inc.*, 688 F.2d 1228, 1230 (9th Cir. 1982). If the court must look to extrinsic evidence in order to interpret a writing, its findings of fact are reviewed for clear error. *U.S. Fin. Sec.*, 729 F.2d at 632; *Culinary & Service Employees Union*, 688 F.2d at 1230; *In re Agricultural Research & Technology Group, Inc.*, 916 F.2d 528, 537 (9th Cir. 1990).

NWEA argued in the court below that the 1984 permit covered only two point sources, outfalls 001 and 002 from the treatment plant.[3] The 1984 permit expressly "covers" only two points sources, outfalls 001 and 002 from the treatment plant. These outfalls are listed on the first page of the permit as the "SOURCES COVERED BY THIS PERMIT." E.R. 222. The 54 CSOs are not listed in this section. The first page of the permit also states that the receiving waterway for these discharges is the Columbia River. The Willamette River and the Columbia Slough are not mentioned.

Immediately below the section listing "SOURCES COVERED," the permit provides a description of the

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[3]Effluent from outfalls 001 and 002 has been treated before it is discharged into the Columbia River.

activities that are covered by the permit. This section, "PERMITTED ACTIVITIES," states that Portland is authorized to "operate a waste water collection, treatment, control and disposal system and discharge to public waters adequately treated waste waters only from the authorized discharge point or points established in Schedule A . . . ." E.R. 222 (emphasis added). Schedule A provides the effluent limitations for outfalls 001 and 002. More importantly, however, it provides that:

> The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water recreation season (June 1 to October 31).[4]

E.R. 223. Thus, on the face of the permit it appears that CSO events were considered to be a "permitted activity." Finally, Schedule C provides that the City must "continue to work toward the separation of sanitary sewage and storm water in presently developed areas in which this method is cost effective." E.R. 224.

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[4]The parties do not dispute that "diversion structure" refers to the CSOs. In earlier permits, the 54 CSOs were listed in this provision of the permit. *See* Supp. E.R. 13 (1979 permit, "Discharge at overflow points 003 through 066 is permitted when the flow at diversion structures exceeds three times the dry weather flow."); Supp. E.R. 2 (1974 permit - same).

NWEA contends that the court should only heed the first portion of the permit listing covered sources.[5] Because the CSOs are not specifically listed on page one as permitted sources, NWEA argues, they must not have been encompassed by the permit and are therefore illegal. To follow this reasoning would require the court to read the references to diversion structures out of the permit altogether. The limitations on the frequency of CSO events and the requirement that Portland work towards upgrading its sewer system would then constitute mere surplusage.

The 1984 permit is clear on its face in permitting CSO events under specified conditions. The description of permitted activities specifically allows Portland to operate a sewage system and to discharge through two separate sets of discharge points, those listed on page one as authorized discharge points, and those described and listed on Schedule A.

The extrinsic evidence presented to the district court only strengthens this conclusion. The parties each offered evidence, in the form of affidavits and other documentary evidence, to support their respective understandings of the 1984 permit. NWEA relied mainly on four documents to

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[5]NEA attempts to downplay the importance and placement of the references to diversion structures, implying that they are somehow a part of the fine print. In reality however, the limitations on the frequency of CSO events appears in normal sized type on page two of the permit, directly below the effluent limits for discharges from outfalls 001 and 002. *See,* E.R. 223.

support the position that the CSOs were not, and had never been, permitted. The first was a letter from W.C. Gaffi, Portland's Chief Engineer, to DEQ in 1988. Gaffi stated that "the City supports ODEQ's position to permit the CSO outfalls through a modification to the existing treatment permit. This approach should achieve the same goal as individual CSO permits and reduce the administrative cost of doing so." E.R. 278. The second document was an October 1990 memorandum from two members of the Portland Bureau of Environmental Services. In this memo, Linda MacPherson and Dave Kliewer indicated the need to set up a "discussion to determine if the CSOs are going to be permitted or not?" E.R. 279. The third is an undated memorandum in which a DEQ employee wrote that "the potential exists for permitting both the storm and combined sewer discharges." E.R. 191. NWEA argues that these three documents imply that the CSOs were not covered under the 1984 permit, because if they were, there would be no need to address including them in future permits.

Finally, NWEA offered a DEQ policy statement entitled "Strategy for Regulating Combined Sewer Overflows."[6] The report states that "none of these outfalls [the CSOs] are covered by a permit, however, all are proposed to be addressed in the Portland-Columbia Blvd STP permit renewal." E.R. 208. NWEA argues that this statement proves that DEQ had not permitted the CSOs in the 1984

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[6]This February 1991 document appears to have been prepared in response to the EPA's National Combined Sewer Overflow Control Strategy. *See* 54 Fed. Reg. 37370 (Sept. 8, 1989).

permit. Portland, however, offered an affidavit by the author of the report to explain the statement. Barbara Burton explained that the quoted text did not mean that Portland's CSOs were not covered by an NPDES permit, and therefore were illegal. Instead, it was intended to convey that "none of the outfalls were individually listed with effluent limitations in Portland's 1984 NPDES permit." E.R. 281 (emphasis in original).

Barbara Burton's impression of the scope of the Portland NPDES permit was shared by Harold L. Sawyer, formerly the Water Quality Division Administrator for DEQ. E.R. 282. Sawyer stated in his affidavit that "Portland's entire sewer system, including CSO outfalls, was permitted by Portland's 1984 NPDES permit and by its prior NPDES permits." E.R. 283. According to Sawyer, DEQ knew, and always had known, that the Portland sewer system operated through a system of CSOs and treatment plants. *Id.* Moreover, "if DEQ had considered combined sewer overflows to be outside of Portland's NPDES permit, as Water Quality Division Administrator for DEQ [he] would have proposed a specified program and schedule for treatment or elimination of such discharges for incorporation in the permit or in a separate compliance order." *Id.* These are the steps that DEQ took in 1991. Thus, "DEQ understood that Portland would continue to operate its combined sewer system as it had been operating the system prior to the existence of the NPDES permitting program, to prevent dry weather combined sewer overflows except during abnormal storm events." *Id.* at 285.

This position is repeated in the 1991 SFO. DEQ stated that "as a matter of policy the Department [DEQ] did not

always list CSO discharge points in an NPDES permit but, in many instances, issued permits for an entire sewer system. . . [Portland's] 1984 NPDES permit is a permit for the sewer system, which includes CSO outfalls, but did not contain specific effluent limitations for CSOs." E.R. 260-61.

The district court, having reviewed these conflicting statements, found Portland's interpretation to be persuasive. The court recognized the import of the Gaffi letter, but determined that it was "not persuasive enough in the face of the common sense reading of the permit, which when examined in context with the older permit and when construed to give the language limiting discharges meaning, directs a conclusion that the 1984 permit covered the CSO discharges." E.R. 83. The Sawyer and Burton affidavits were more persuasive because their explanations of the 1984 permit comported with the language of the permit itself. *Id.*

NWEA argues that, notwithstanding the extrinsic evidence, under the rules of contract interpretation the court must find that the CSOs were not covered by the 1984 permit. Courts should, if possible, interpret a contract so that its terms will not be illegal. *See* Corbin, Contracts§546 at 169 (1960). This rule is advisory and should not be applied blindly to the detriment of the parties' intentions. "[A] specific provision in an otherwise valid contract should not be given a meaning that would have a legal effect that the court is convinced the parties did not intend, even though any alternative meaning will cause the provision to have no legal effect whatever." *Id.*

Under the regulations promulgated pursuant to § 1342 of the Clean Water Act, all NPDES permits should establish technology-based effluent limitations for all permitted point sources. 40 C.F.R. 122.44(a). Although technically the permit should have established effluent limitations for the CSOs, it appears that the parties intended to omit such requirements. The district court was presented with sufficient evidence from which it could determine that DEQ, as well as Portland, intended this allegedly unlawful interpretation. EPA approved the terms of the permit, including the absence of effluent limitations for the CSOs, even though the existence of the CSOs was clear on the permit's face. Moreover, prior to 1989, it appears that many state permitting bodies believed that CSO outfalls could be permitted without being subjected to effluent limitations. *See National Combined Sewer Overflow Control Strategy*, 54 Fed. Reg. 37370, 37371 (1989) (proposed regulations to "control effluents from combined systems which are not regulated under the sanitary system standards nor as discharges from separate storm sewer regulations"). *Cf., Montgomery Environmental Coalition v. Costle,* 207 U.S. App. D.C. 233, 646 F.2d 568, 592 (D.C. Cir. 1980) (interpreting permit as allowing limited CSO events without effluent limitations).

NWEA next argues that the district court erred by failing to interpret the permit in the public interest. This is "a rule of construction rather than one of interpretation, one that for reasons of public policy requires the court to give to a contract that legal operation that is of public advantage, when a choice between that and a less advantageous operation is reasonably open." Corbin, *supra* § 550 at 196. In NWEA's view, the 1984 permit should be

interpreted as not allowing the CSOs because "clearly it is not in the public interest to construe a permit so as to authorize the gross pollution of public waterways." Reply at 7. The alternative to the CSOs is a total revamping of the Portland sewer system, the cost of which has been estimated at as much as 1.2 billion dollars. E.R. 221. Moreover, until such renovations could be completed, if the excess effluent during storms was not released through the CSOs the effluent would "flood [ ] streets and basements." Sunnarborg Aff., Supp. E.R. 21. Although water pollution is unfortunate, it beggars credulity to argue that this alternative is so clearly more in the public interest than the CSO events.

The district court's findings are not clearly erroneous. There was significant evidence from DEQ, the permit author, to indicate that the CSOs were covered in the 1984 permit. Moreover, DEQ's interpretation, that the CSOs were permitted but not separately listed, does not directly conflict with NWEA's offered extrinsic evidence. Given Sawyer's and Burton's explanations, Gaffi and MacPherson's concerns about permitting the CSOs can be explained as concern over whether the CSOs should be expressly listed on new permits. We, accordingly, affirm the district court's finding that the permit authorized limited discharges from the CSOs.

B. Does NWEA Have a Cause of Action for Water Quality Violations?

NWEA argues that the district court erred in finding that it did not have jurisdiction over a citizen suit for the enforcement of the water quality maintenance provision of

the NPDES permit. In the court below NWEA argued that, whether or not the CSOs were specifically permitted under the 1984 NPDES permit, Portland had violated and continued to violate conditions of both the 1984 and 1991 NPDES permits. Specifically, NWEA alleged that Portland's CSO events violated a permit condition prohibiting any discharges that would violate Oregon water quality standards. The 1984 permit held, as a condition in Schedule A, that "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in OAR 340-41-445 except in the following defined mixing zone . . ." 1984 Permit, E.R. 223. The mixing zone was defined as a 100 foot radius around the discharge point. *Id.* The 1991 permit contained similar limitations but eliminated the mixing zone provision. It also expressly applied the condition to the CSOs. *See* E.R. 235 and compare with E.R. 223. NWEA offered declarations and scientific reports that it argued establish continuing violations of the water quality standards in the waters surrounding the CSOs after CSO events. *See, e.g.*, Portland's Response to Interrogatories, E.R. 119 (failure to meet fecal coliform standards); Thutt Aff., E.R. 164 ("not possible to have any CSO event that would not exceed the DEQ's fecal coliform standard"); Rosolie Aff., E.R. 153-54.

The district court never reached the question of Portland's liability for violations of this permit condition. Instead, the district court held that § 505 of the Clean Water Act, 33 U.S.C. § 1365, did not grant federal jurisdiction for the citizen enforcement of water quality violations, "because water quality standards do not equal 'effluent standards or

limitations under this chapter.'" E.R. 84. The court concluded that violations of water quality standards may be actionable "only if they are incorporated into an NPDES permit through effluent limitations." E.R. 86. Because the plain language of CWA § 505, the legislative history, and case law support a finding of citizen suit jurisdiction in this case, we reverse on this issue.

[6] The plain language of CWA § 505 authorizes citizens to enforce all permit conditions. That section provides: "[A]ny citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the Clean Water Act] . . . ." 33 U.S.C. § 1365(a)(1)(A). An effluent standard or limitation includes "(2) an effluent limitation or other limitation under section 1311 . . . or (6) a permit or condition thereof . . . ." 33 U.S.C. § 1365(f)(2), (f)(6) (emphasis added). This language clearly contemplates citizen suits to enforce "a permit or condition thereof". Portland holds a National Pollutant Discharge Elimination System (NPDES) permit,[7] and the water quality standards are conditions of its permit.

Portland argues that § 505 allows citizens to enforce only those water quality standards that are translated into effluent limitations. To support this argument, Portland reasons that the effluent limitations, which were imposed

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[7]As noted above, the NPDES permit program makes it unlawful for any person to discharge a pollutant without obtaining an NPDES permit from the State and complying with its terms. 33 U.S.C. § 1342.

by the 1972 amendments to the CWA, effectively displaced water quality standards as the primary means of regulating pollution. Portland explains that Congress retained water quality standards as the ultimate goal of pollution control, but sought to achieve this goal through end-of-the-pipe limitations.

Portland misconstrues the effect of the legislative history of the 1972 amendments to the CWA. To be sure, the 1972 CWA amendments reflect Congress' dissatisfaction with the system of water quality standards. But nowhere does Congress evidence an intent to preclude the enforcement of water quality standards that have not been translated into effluent discharge limitations. The fact that Congress created a new, simpler enforcement method based on effluent limitations does not mean that Congress intended to foreclose citizen suit enforcement of water quality standards. In fact, the legislative history indicates just the opposite.

By introducing effluent limitations into the CWA scheme, Congress intended to improve enforcement, not to supplant the old system. In the legislative history, the Senate Committee first outlined the dual purposes of water quality standards: "The standards are intended to function . . .[a]s a measure of performance . . . [and] to provide an avenue of legal action against polluters. If the wastes discharged by polluters reduce water quality below the standards, actions may be begun against the polluters." S. Rep. No. 414, 92nd Cong., 2nd Sess. 2 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3671; 40 C.F.R. § 131.2 (1992) (dual purposes).

Next, the Committee expressed dismay over the "almost total lack of enforcement" under the old system that depended exclusively upon water quality standards. 1972 U.S.C.C.A.N. at 3672 ("[O]nly one case has reached the courts in more than two decades."). Given Congress' concern about non-enforcement, Portland erroneously takes a narrow view of Congress' broad provision for "citizen participation in the enforcement of control requirements and regulations established under [the CWA] . . . ." *Id.* at 3745.

The Senate Committee expressly stated that "[i]n addition to violations of section 301(a) [26 U.S.C. § 1311, Effluent Limitations] citizens are granted authority to bring enforcement actions for violations of . . . any condition of any permit issued under section 402 [26 U.S.C. § 1342]." 1972 U.S.C.C.A.N. at 3747 (emphasis added).[8] Also, the Committee explained that it modeled the citizen suit provision on the analogous Clean Air Act ("CAA") provision that applies to air pollution permit conditions.[9]

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[8] See also *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 16-17 (1981) (recognizing that the "broad category of potential plaintiffs" envisioned by Congress in the citizen suit provision "necessarily includes . . . plaintiffs seeking to enforce [the CWA] as private attorneys general").

[9] The Clean Air Act ("CAA") provision authorizes citizen suits for alleged violations of "an emission standard or limitation under [CAA] . . . [, defined in relevant part as an] emission limitation, standard of performance or

Id. at 3745. Thus, consistent with the statutory language, the legislative history of the citizen suit provision reflects Congress' intention to grant broad authority for citizen enforcement.

Ample case law supports our view that Congress intended to confer citizens standing to enforce water quality standards. Most notably, in PUD No. 1 of *Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900, 1910-14 (1994) (Jefferson County), the Supreme Court held that the Clean Water Act allows States to enforce the broad narrative criteria contained in water quality standards. In *Jefferson County*, a county which proposed to build an electricity-generating facility on a river challenged a minimum stream flow condition established by the State.[10] Although the county did not

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emission standard, . . . or any condition or requirement of a permit under . . . [sections of CAA] . . . or under an applicable [state] implementation plan." 42 U.S.C. § 7604(a), (f) (emphasis added).

[10] Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), authorizes the State to impose conditions for certification of a proposed project based upon several enumerated sections of the Clean Water Act. Although CWA § 303, 33 U.S.C. § 1313, is not one of the statutory provisions listed in CWA § 401(d), the Supreme Court concluded that States may condition § 401(d) certification upon compliance with § 303. The Court reasoned that because § 401(d) lists § 301 as a provision with which an applicant must comply, and § 301 in turn incorporates §

contest the State's authority to set limitations designed to ensure compliance with state water quality standards adopted under CWA § 303, the county argued that § 303 requires the mentation of "specific numerical criteria." *Id.* at 1910. The county contended that the State may not require it to operate the dam in a manner consistent with a "designated use," which is a qualitative requirement of the § 303 water quality standards. *Id.*

The Court rejected the county's argument, and held that the State may require a permit applicant to comply with the

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303 by reference, "state water quality standards adopted pursuant to§303 are among the 'other limitations' with which a State may ensure compliance through the§401 certification process." Jefferson County, 114 S. Ct. at 1909. Section 303 requires that any water quality standard adopted by the State "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." 33 U.S.C.§1313(c)(2).

The State issued a§401 water quality certification imposing a variety of conditions on the project, including a minimum stream-flow requirement of between 100 and 200 cubic feet per second. The State determined that construction and operation of the project as planned would interfere with one of the designated uses of the river, viz., salmonid migration, rearing, spawning, and harvesting, but that the minimum stream flow requirement would ensure compliance with the§303 water quality standards.

qualitative designated uses requirement. *Id.* The Court explained that under the literal terms of CWA § 303(c)(2), a water quality standard must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *Id.* Thus, the Court concluded that a project that does not comply with a designated use of the water does not comply with the applicable water quality standards. *Id.* The Court also explained that CWA § 401(d), which provides for State certification of projects, explicitly authorizes "any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under . . . [CWA § 303] . . . and any other appropriate requirement of state law." *Id.*

By its holding, the Court expressly rejected the county's argument that designated use requirements are "too open-ended" to be enforceable and that the Clean Water Act only contemplates enforcement of the more "specific and objective" numerical criteria:

> [The county's] argument is belied by the open-ended nature of the criteria themselves . . . criteria are often expressed in broad, narrative terms. . . . In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)" need be rendered in numerical form. . . . [The county's] attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Id. at 1911 (emphasis added).

The county's losing argument in *Jefferson County* is very similar to the argument advanced by Portland in the instant case. Portland argues that citizens may not enforce the broad narrative conditions of state water quality standards, but may enforce only those conditions that have been translated into numeric effluent limitations.

We disagree with Portland's contention that *Jefferson County* is inapposite to the issue before us. Even though Jefferson County involved a state's authority to impose conditions under CWA § 401, whereas the present litigation involves citizen suit enforcement of CWA § 402 conditions, both the § 401 certification process and the § 402 permit process require applicants to comply with CWA § 301. As noted above, § 301 incorporates by reference the water quality requirements of § 303.

Moreover, although *Jefferson County* addressed the authority of States, not citizens, to enforce the narrative conditions of CWA § 303 water quality standards, nothing in that language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens from enforcing the same conditions of a certificate or permit that a State may enforce. To the contrary, as demonstrated above, these sources uniformly support broad citizen enforcement authority, including the authority to enforce water quality standards.

In addition to *Jefferson County*, numerous cases support a finding of citizen suit jurisdiction in this case. The Supreme Court has acknowledged citizen standing under CWA § 505(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated effluent limitations and

state-established standards. *See E.P.A. v. California*, 426 U.S. 200, 224-25 (1976). By applying § 505(f)(6), several courts have hed that citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations. In fact, permit conditions that courts commonly enforce under § 505(a) are not effluent limitations, but rather, requirements for retaining records of discharge sampling and for filing reports. *See e.g., Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) ("Simkins' reporting requirements are expressly made conditions of its permit, and therefore, violations of these conditions, by operation of § 1365 (f)(6) [CWA § 505(f)(6)], are violations of an effluent standard or limitation of § 1365(a)."), *cert. denied*, 491 U.S. 904 (1989). Other examples of enforceable permit conditions include conditions relating to sewage maintenance, *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980), *aff'd*, 644 F.2d 995 (3rd Cir. 1981), and construction schedules, *Locust Lane v. Swatara Township Auth.*, 636 F. Supp. 534, 539 (M.D. Pa. 1986) (rejecting defendant's attempt "to impose a limitation on § 1365 where one is neither supported by the language nor the legislative history"). Finally, citizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the Clean Water Act, namely discharges that may never reach navigable waters. *Connecticut Fund For Env't v. Raymark Indus., Inc.*, 631 F. Supp. 1283, 1285 (D. Conn. 1986).[11]

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[11] When this Court and other courts have he at citizens may not enforce water quality standards under § 505(a)(1), they addressed standards that were not included in

[8] Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole. Citizen suit enforcement of water quality standards is necessary to the effective enforcement of effluent limitations. Congress recognized that water quality standards "often cannot be translated into effluent limitations . . . ." 1972 U.S.C.C.A.N. at 3675. For example, certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids). *See* Or. Admin. R. 340-41-445(2)(f), (1), (k). Even after the 1972 amendments, states may adopt similar standards and express water quality criteria "as constituent concentrations, levels, or narrative statements . . . ." 40 C.F.R. 131.3(b) (1992).

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a NPDES permit. Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987) (suit to enforce water quality standards allegedly breached by nonpoint sources, which are never regulated by NPDES permits); McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988) (finding no citizen suit jurisdiction existed, because "a state water quality standard can constitute an effluent standard or limitation enforceable under section 505 only if it has been incorporated into an NPDES permit") Montgomery Envtl. Coalition Citizens Coordinating Comm. on Friendship Heights v. Washington Suburban Sanitary Comm'n, 607 F.2d 378, 381 (D.C. Cir. 1979).

Many discharges remain unregulated and primarily subject to water quality standards, despite statutory deadlines for achieving effluent limitations, 33 U.S.C. § 1311 (b)(1)(A) (1977 deadline for first-stage effluent limitations on all point source discharges), § 1311(b)(2) (West 1993 Supp.) (1989 deadline for second-stage, more stringent controls). Furthermore, in cases where effluent limitations do apply, they serve only as national, minimum requirements; states may adopt stricter, enforceable water quality standards and limitations. 33 U.S.C. § 1370.

By interpreting § 505 to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations, Portland would have us immunize the entire body of qualitative regulations from an important enforcement tool.[12] Such a result would be especially troubling in this case, because no effluent limitations cover the discharges from Portland's combined sewer overflows ("CSOs").[13]

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[12] Congress set deadlines for promulgation of effluent limitations, and therefore, must have anticipated a five-year lag, 1972-1977, before universal applicability of effluent limitations. However, nothing in the legislative history indicates that Congress intended to stall citizen enforcement of permit terms until promulgation of effluent limitations.

[13] Nor can citizens find consolation in their state court remedy of objecting to the contents of a permit within sixty days of its issuance, Or. Rev. Stat. 183, 484 (2). Citizens groups such as NWEA might not wish to dispute the issuance or contents of a permit, but to enforce the permit's

CSOs are the overflow points from combined sewage and stormwater collection systems. Because the number and volume of overflow events from CSO systems are caused primarily by uncontrollable events--i.e., the amount of stormwater entering the system--regulators have no ready way of determining what portion of the flow in a given discharge event is sewage and what portion is rainwater. Without this information, it is impossible to determine the level at which to set a numeric concentration-based permit limit in order to ensure that the gross amount of pollution discharged will not violate water quality standards.

In *Jefferson County*, the Supreme Court recognized that the numerical criteria components of state water quality standards cannot reasonably be expected to address all the water quality issues arising from every activity which can affect the State's hundreds' of individual water bodies. 114 S. Ct. at 1912. The Court reasoned that requiring the States to enforce only the numerical criteria component of their water quality standards "would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses." *Id.* Accordingly, the Court stated that in the absence of "textual support for imposing this requirement," it was "loath to attribute to Congress an intent to impose this heavy regulatory burden on the States." *Id.*

Because the statutory language, legislative history, and case

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terms.

law authorize citizens to enforce permit conditions stated in terms of water quality standards, we hold that NWEA has standing to enforce the water quality standards contained in Portland's NPDES permit.

C. Procedural Determinations

In the court below, Portland asserted two other jurisdictional arguments upon which NWEA now seeks a determination. Portland argued that 1) the case was moot because of the changes in the 1991 permit; and 2) any action was barred under 33 U.S.C. § 1319(g)(6) by DEQ's subsequent enforcement actions.

Because NWEA claims entitlement to attorney's fees based on the alleged violations of the old permit, and seeks to enforce the water quality standards independently of the effluent limitations, a live and genuine controversy remains, so the case is not moot. With respect to the § 1319(g)(6) defense, the district court did not reach this question, having ruled against NWEA on other grounds. We therefore remand for a determination on this issue.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's holding that the 1984 permit covered the CSOs, and we REVERSE the district court's holding that CWA § 505(a) does not confer jurisdiction for citizen suits to enforce water quality standards when they are conditions of a CWA permit.

AFFIRMED in part, REVERSED in part, and

REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent from Part II-B of the opinion. I concur in Part II-A.

We decided this case and filed our opinion in 1993, at 11 F.3d 900. As the majority concedes in footnote 1, the full court voted on whether to go *en banc*, and decided against it. We are required by Federal Rule of Appellate Procedure 41(a) to issue our mandate seven days after entry of the order denying the petition for rehearing. I do not know why this was not done.

The only justification I can see for us to issue a new decision, contrary to our previous one and contrary to what we said in *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F. 2d 842 (9th Cir. 1987), would be a Supreme Court decision to the contrary. When the Supreme Court makes a decision which renders a decision of ours erroneous, we sometimes recall a mandate and revise our disposition in light of the Supreme Court decision. The majority opinion suggests that PUD No. 1 of *Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994), has changed the law. If it did with respect to an issue dispositive of the case before us, I would not object to recalling our mandate to correct our error. But it does not.

The question before us is whether citizens' suits may be brought to enforce water quality standards, as opposed to

effluent limitations. *Jefferson County* says nothing about that. Basically, water quality standards say that a body of water should be no more polluted than the standard. Effluent limitations say that a particular discharger may discharge no more than the allowed quantity of pollutants. *Jefferson County* does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits. The question the court decided was whether "the state environmental agency, properly conditioned a permit for the project on the maintenance of specific stream flows to protect salmon and steelhead runs." *Id.* at 1905. The court decided that EPA's interpretation, "that activities, not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference." *Id.* at 1909.

If we were to try to tease something out of *Jefferson County* to assist our decision in this case, we would do better to focus on the Court's discussion of the appropriate use of water quality standards, which is to generate limitations for specific activities. Here is the Court's discussion of the distinction between water quality standards and effluent limitations:

> Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the River as a fishery, must be translated into specific limitations for individual projects.

Id. at 1911 (emphasis added); *see also id.* at 1910 ("States may condition certification upon any limitations necessary to ensure compliance with state water quality standards."

(emphasis added)).

We have said that only permit limitations derived from water quality standards, not water quality standards themselves, are enforceable by citizens' suits. *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F. 2d 842 (9th Cir. 1987).

> Thus, effluent limitations may be derived from water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the "limitations necessary to meet" those standards, or "required to implement" the standards.

Id. at 850 (emphasis added).

While our statement in *Oregon Natural Resources Council* may be dictum as applied to the case at bar, I do not see a good reason for deciding the case at bar inconsistently with what we said in *Oregon Natural Resources Council*. The Supreme Court has now analyzed the difference between water quality standards and effluent limitations along the same lines in *Jefferson County*. Judge Ingram's earlier opinion in the case at bar pointed out that "the authorities generally reject citizen suit standing to enforce water quality standards," and appellants "have not been able to find a single case in which a court held that citizens' suits could be used to enforce water quality standards." *Northwest Environmental*, 11 F.3d at 907.

The majority reasons that 33 U.S.C. § 1365 allows

citizens' suits for violation of "an effluent standard," and defines "effluent standard" as "a permit or condition thereof," and Portland's permit, in addition to detailed effluent limitations, requires that no wastes be discharged which would violate water quality standards. This reasoning has force, and I am troubled by the difficulty of applying *Oregon Natural Resources Council* in the face of this logical, literal construction.

Nevertheless, we previously concluded on the basis of analysis of several additional provisions of the statute that it is not the permittee who must comply with the water quality standards, but rather the issuing authority, which has a "duty . . . to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met." *Northwest Environmental*, 11 F.3d at 908. That makes sense in light of what the Supreme Court said in *Jefferson County*. Congress meant for the issuing authority to decide upon end-of-pipe effluent standards for the permit, which it could derive from water quality standards, when Congress allowed citizens' suits to enforce permit limitations. It did not mean for citizens' suits to proceed on the basis of permit violations, where the permittee complied with end-of-pipe discharge limitations but the water still wound up being too polluted. A water quality standard should be deemed to be not among those authorized by the statute for purposes of citizen suit enforcement.

The City of Portland persuasively argues that, if the water quality standard were used as a basis for punishing sewage overflows during rainy weather, then the detailed end-of-pipe discharge limitations in the permit designed for this

precise problem would have no practical effect. The City provided evidence that the actual intent of the permit issuing authority and the City of Portland was that the water quality standards language was put in for pollutants other than the ones, such as the sewage overflows in rainy weather, known about when the permit was issued. This reading would be consistent with the general principle of treating the specific as overcoming the general. *See Karrell v. US*, 181 F. 2d 981 (9th Cir. 1950) (specific provision governs even though general provisions, if standing alone, would include the same subject); *International Ass'n of Machinists & Aerospace Workers v. Boeing*, 833 F.2d 165, 169 (9th Cir. 1987) (same). We should follow the City's persuasive construction of the permit.

The majority's argument from legislative history and policy seems to me to have no force. The history shows that because of the ineffectiveness of water quality standards as pollution limiting device, Congress decided to change the enforcement mechanism to effluent limitations. *See Northwest Environmental*, 11 F.3d at 909-11.

The majority argues that as a matter of policy, Congress meant to prevent pollution, and citizens' suits add power to anti-pollution enforcement mechanisms, so there is no reason to deny citizens' suits enforcement. The first two propositions do not imply the third. There can be too much of a good thing. *See, e.g.*, on other subjects, *United States ex rel. Miller v. Greer*, 789 F.2d 438, 451-52 (7th Cir. 1986) (Easterbrook, J., dissenting); *National Labor Relations Bd. v. Walton Manufacturing Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting). There is too much of a good thing when its value is exceeded by the

value of other good things available for the same or less cost.

Water quality standards are a useful device for government enforcement authorities (who decided not to prosecute this case against the City of Portland), because they provide standards for effluent limitations and goals toward which enforcement should be aimed. They are too uncertain and amorphous, however, for use against specific polluters. Suppose, hypothetically, that water quality standard allows for 100 units of a pollutant, upstream and non-point source polluters discharge 50 units, and the downstream discharger is permitted to discharge 50 units. If the upstream and non-point source polluters increase their discharge to 80 units, it does not automatically follow that the downstream discharger should be limited to 20. The burdens of so severe a limitation may exceed the burdens of the extra pollution, or enforcement efforts might more appropriately be directed at the other polluters. In the case at bar, the majority concedes that the social costs of filling the streets and basements of Portland with sewage, or spending between a half billion and $1.2 billion dollars on renovation, are the practical alternatives to tolerating violations of the water quality standards. *See* Majority Opinion at I-A, II-A. A public authority might rationally decide that filling the streets and basements with sewage is worse than polluting the river with it, and that the citizens of Portland need several years to raise and spend the money necessary to avoid running the sewage into the streets, the basements, and the river.

The reason that this case has not been rendered moot by subsequent changes in the permit which eliminated the basis

for the claims is NWEA's claim for attorneys' fees and possibly civil penalties. If the private advocacy group which brought this action prevails on the claim that the City should have done something more than it did under its now-obsolete permit, then it will obtain a great deal of money from the citizens of Portland. This incentive is why citizens' suits may produce to much of a good thing with regard to enforcement.

Suppose, hypothetically, we authorized citizens' suits to enforce highway speed limits. We can all agree that excessive speeds on the highways are undesirable, and that highway patrol officers are too few to ticket all the drivers who speed. We would get more prosecution, and more court cases, then the prudent exercise of discretion would justify. A police officer might exercise discretion not to ticket drivers less than 10 miles per hour over the limit, because the increased danger was negligible, and the enforcement burden to the officer and the courts great. The officer might, however, ticket a speeder with a makeshift towing rig which looked dangerous. The officer and the judge would be pleased to have only one ticket, not hundreds, to dispose of, and the enforcement expense would be small relative to the reduction in danger. A "public interest advocacy group," however, would have an incentive to ticket all the automobiles going a few miles per hour over the limit, because the private group, unlike the police officer and the judge, would have a financial incentive to enforce against the large number of minor violators, even though the burdens of enforcement would be very high relative to the improvement in public safety. A zealous concern for safety on the highways would

doubtless contribute to doing well by doing good, but there would be too much good done.

In the case at bar, all the precedents indicate that citizens' suits are not allowable for violations of water quality standards, where those standards are not translated by the permit into effluent limitations. There is no good reason for avoiding application of precedent, and creating new law which allows citizens' suits for purposes of obtaining attorneys' fees and penalties for past violations of water quality standards. We should have left our previous decision alone.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES A Non-Profit Oregon Corporation, and NINA BELL, Plaintiffs-Appellant, vs. CITY OF PORTLAND, Defendant-Appellee.	)	No. 92-35044 D.C. No. CV-91-339-PA ORDER

Filed January 24, 1996

Before:Pregerson, Kleinfeld, Circuit Judges, and INGRAM, District Judge.*
Dissent by Judge O'Scannlain.

Judges Pregerson and Ingram voted to deny appellee's amended petition for rehearing. Judge Pregerson voted to reject the suggestion for rehearing en banc and Judge Ingram so recommended.
Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.
The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehearing the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.
The amended petition for rehearing is denied and the

suggestion for rehearing en banc is rejected.

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*The Honorable William Ingram, United States Senior District Judge for the Northern District of California, sitting by designation.

Northwest Environmental Advocates v. City of Portland, No. 92-35044

O'SCANNLAIN,
Circuit Judge, joined by HALL, T.G. NELSON, and KLEINFELD, Circuit Judges, dissenting from order rejecting suggestion for rehearing en banc.

By failing to rehear this case en banc, we have significantly reshaped federal environmental law, without consent of Congress, to the curious end that any citizen will now be permitted to bring a lawsuit at government expense for the enforcement of state water quality standards that have not been translated into effluent limitations in federal permits. Such unwarranted expansion of citizen standing conflicts with the plain language of the Clean Water Act and with prior decision of this circuit and others.

It should go without saying that the environment faces real and growing dangers that warrant protective measures and challenge us to develop innovative solutions. Nevertheless, by allowing citizens to enforce standards that Congress specifically allocated to government agencies to monitor, the court has upset the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law. The result promises to invite excessive, costly, and counterproductive citizen suits,

funded by the taxpayers, for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected.

The Clean Water Act allows citizens to enforce effluent limitations contained in federal permits, but the Act does not permit citizens to enforce general water quality provisions. 33 U.S.C. § 1365. There is more than a technical distinction involved; there are significant consequences at stake. Water quality standards address the level of pollutants found in a body of water, while effluent limitations focus on the level of pollutants in the effluent discharged into a body of water by a particular discharger. As Judge Kleinfeld notes in his well-articulated dissent, "[w]ater quality standards are a useful device for government enforcement authorities . . . because they provide standards for effluent limitations [but water quality standards] are too uncertain and amorphous . . . for use against specific polluters." *Northwest Environmental Advocates v. Portland*, 56 F.3d 979, 992 (9th Cir. 1995) (Kleinfeld, J., dissenting) ("*NWEA II*"). While state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements, they should not be used as a vehicle for flooding the federal courts with citizen suits against permittees who are meeting the specific requirements (i.e. effluent limitations) outlined in their permits.

In its original opinion released more than two years ago, the same panel, writing for the court, held the exact opposite of what it now holds. There, the then-majority opined that citizens do *not* have a private right of action to enforce water quality standards contained in Portland's

permit because such standards do not constitute an "effluent standard or limitation" under 33 U.S.C. § 1365(a) and (f) and ruled for the City of Portland. *Northwest Environmental Advocates v. Portland*, 11 F.3d 900 (9th Cir. 1993) ("*NWEA I*"). Judge Pregerson dissented. The citizen plaintiffs then filed a suggestion for rehearing en banc which failed to receive a majority of votes of the active judges of the full court. On April 25, 1994, the panel resumed control of the case. Instead, however, of entering the order denying the petition for rehearing and rejecting the suggestion for rehearing en banc, and thereby allowing the mandate to issue seven days later under FRAP 41(a), the panel held on to the case and reconsidered its holding in light of *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, __ U.S. ___, 114 S. Ct. 1900 (1994) ("*Jefferson County*"), which the Supreme Court decided on month *after* rejection of the en banc call in *NWEA I*. Relying on *Jefferson County*, the panel developed a new majority and thereupon vacated its original opinion and substituted a new one holding that citizens indeed *do* have standing under the Clean Water Act to enforce water quality standards. *NWEA II*, 56 F.3d 979, filed June 7, 1995.

In my view, the panel erred by reversing its original position, because *Jefferson County* simply does not support such reversal and the panel's new holding conflicts not only with a prior decision of our own court, but also with the law of other circuits. The court now cites *Jefferson County* in support of the view that Congress intended to confer standing on citizens to enforce water quality standards. *NWEA II*, 56 F.3d at 987. However, as the majority eventually acknowledges, *id.*, at 988, and as the dissent

emphasizes, *Jefferson County* has nothing to do with citizens' standing. *Id.* at 990 (Kleinfeld, J., dissenting) ("*Jefferson County* does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits.").

Instead of addressing citizen standing to enforce a permit condition, *Jefferson County* concerns a local utility district's appeal of a stream flow condition imposed by the state as part of the state's certification of the district's application for a federal permit to build a hydroelectric power plant. ___ U.S. ___, 114 S. Ct. at 1907-08. The Supreme Court held that "States may condition certification [of projects] upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law,'" and that the minimum flow condition imposed by Washington was an appropriate requirement of state law. *Id.* at ___, 114 S. Ct. at 1910. This holding merely indicates that states may impose certain water quality requirements as conditions for granting the state certification that must be obtained by an applicant seeking a federal permit. *In no way* does this holding support the notion that citizens have a private right of action to challenge permit conditions that have not been translated into effluent limitations.

Section 505 of the Clean Water Act authorizes federal jurisdiction over citizen suits "(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a)(1). In defining "effluent standard or limitation," the section refers to various discharge-related limitations that may be imposed by other sections of the Act or by a

federal permit. 33 U.S.C. § 1365(f); *see* 33 U.S.C. § 1365(f)(G) ("effluent standard or limitation" means "a permit or condition thereof"); *Jefferson County*, __ U.S. __, 114 S. Ct. at 1915, 1916-17 (Thomas, J., dissenting) (describing discharge-related limitations in the Act).

Since the citizen-plaintiffs in this litigation allege violations, not of effluent limitations, but rather of a state water quality provision contained in Portland's permit, the citizens fail to meet the Clean Water Act's requirements for citizen standing. By holding otherwise, *NWEA II* conflicts with our decision in *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) ("*ONRC*"), in which we stated that citizens may file suit to enforce permit limitations derived from water quality standards, but not water quality standards themselves. *Id.* at 850 ("[E]ffluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable. . . .").

Granted, *ONRC* involved citizens attempting to enforce state water quality standards under 33 U.S.C. § 1311(b)(1)(C), as opposed to state water quality standards contained in a permit. However, the court's conclusion that the Clean Water Act forbids citizens from suing to enforce water quality standards under section 1311(b)(1)(C) may logically be extended to suits by citizens to enforce water quality standards in permits. *See NWEA I*, 11 F.3d at 907 (citing authorities indicating that "whenever courts have been faced with the question, the answer has been that

citizen suits cannot be used to enforce water quality standards").

As the same panel declared in *NWEA I*, "[The plaintiffs] have not been able to find a single case in which a court held that citizen suits could be used to enforce water quality standards, whether the water quality standards were incorporated in a NPDES [National Pollution Discharge Elimination System] permit or not." *Id.* at 907-08; *see also id.* at 909-11 (outlining legislative history supporting conclusion that citizens lack standing to enforce water quality standards that have not been translated into effluent limitations).

No other circuit has recognized a right of citizens to sue for the enforcement of state water quality standards contained in permits. In fact, other circuits have explicitly and implicitly ruled out such suits. *See Save Our Community v. United States Environmental Protection Agency*, 971 F.2d 1155, 1162 (5th Cir. 1992) ("Without the violation of either (1) an effluent standard or limitation under the CWA, or (2) an order issued with respect to these standards and limitations, the district court lacks jurisdiction to act [in a citizen suit]."); *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 979 (2d Cir. 1984) ("'[a]uthority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act'" (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 80 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747)).

Furthermore, the holding in *NWEA II* directly conflicts with the Second Circuit's decision in *Atlantic State Legal*

Foundation v. Eastman Kodak, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, ___, U.S. ___, 115 S. Ct. 62 (1994). In *Atlantic States*, the Second Circuit held that "state regulations, including the provisions of SPDES [State Pollutant Discharge Elimination System] permits, which mandate 'a greater scope of coverage than that required' by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365." *Id.* at 359 (citation omitted). In addition, the court noted:

> States may enact stricter standards for wastewater effluents than mandated by the CWA and federal EPA regulations. 33 U.S.C. § 1342(b). These states' standards may be enforced under the CWA by the states or the EPA, 33 U.S.C. § 1342(h), but private citizens have no standing to do so.

Id. at 358.

In short, *NWEA II,* contradicts the plain language of the Clean Water Act, conflicts with a prior decision of this circuit, and creates a needless intercircuit conflict with all courts of appeals that have addressed the issue. The decision establishes a citizens' cause of action that Congress never intended and that no other circuit has felt compelled to recognize.

Failure to rehear this case en banc is a most unfortunate and unsettling misstep in the orderly development of federal environmental law. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation, and NINA BELL, individually,	) CV No. 91-339-PA
Plaintiffs,	) AMENDED OPINION
v.	)
CITY OF PORTLAND,	)
Defendant.	)

January 8, 1992

PAUL FORTINO
MARY C. WOOD
Perkins Coie
Suite 2500
U.S. Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204
Attorneys for Plaintiffs

PATRICK A. PARENTEAU
700 NE Multnomah
Suite 400
Portland, OR 97232

JAN L. BETZ
LINDA MENG
TERENCE L. THATCHER
Deputy City Attorneys
315 City Hall
1220 SW Fifth Avenue
Portland, OR 97204
Attorneys for Defendant

PANNER, J.

Plaintiffs Northwest Environmental Advocates (NWEA) and Nina Bell, NWEA's Executive Director, bring this action against defendant City of Portland under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. Plaintiffs seek to end defendant's discharge of raw sewage and other wastes into the Willamette River and the Columbia Slough, a tributary of the Willamette.

Pursuant to the parties' stipulation, I considered all materials filed in support of defendant's motion to dismiss and motion for summary judgment, and plaintiffs' cross motion for partial summary judgment, as submissions for a court trial on liability only with final argument on November 25, 1991. Having considered all such materials and the arguments presented, I find for defendant. These are my findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

FINDINGS OF FACT

The City's sewer system is antiquated. The majority of the system is a "combined sewer," carrying both sanitary waste and storm runoff. Sanitary waste is untreated raw sewage. Because it carries storm runoff, volume carried by the sewer system increases when it rains. Before 1947, the combined sewers dumped all flow directly into the Willamette River and the Columbia Slough.

In 1947 defendant began building interceptors in the sewer lines. The interceptors are designed to divert the sewer flow from entering the waterways and pipe the waste to a

sewage treatment plant. The treated effluent from that facility is then discharged into the Columbia River. This is how the system operates today.

The interceptors, however, do not have unlimited capacity. They were designed to divert, or "intercept," three times the average dry weather flow. They can carry the anticipated flow of sanitary sewage, plus the storm water runoff from light rain storms.

Today, when more storm runoff and sewage flows through the system than the interceptors and the treatment plant can handle, the pipes that formerly discharged directly into the Willamette River and the Columbia Slough, do exactly that: discharge the excess flow directly into those bodies of water, without treatment. The actual discharge from these points, and sometimes the pipe themselves, are called "combined sewer overflows" or CSOs.

The CWA establishes the National Pollutant Discharge Elimination System (NPDES), under which permits for discharges into navigable waters are issued by the Administrator of the Environmental Protection Agency (EPA). The permit system may also be administered by a state if the state program is approved by the EPA Administrator. 33 U.S.C. § 1342(b).

Oregon's federally approved NPDES program is administered by the Department of Environmental Quality (DEQ) and DEQ's parent commission, the Environmental Quality Commission (EQC). NPDES permits are issued for five-year periods. DEQ issued NPDES permits to defendant for defendant's sewer system in 1974, 1979, and

1984. A major issue in this case is whether the 1984 permit covered the CSO discharges. As discussed below, I find that the 1984 permit did cover the discharges.

The 1984 permit was due to expire in July 1989. It stayed in effect after that date during the renewal process. Or. Admin. R. 340-14-030. In December 1990, DEQ provided defendant with a preliminary draft permit which incorporated some CSO requirements that EPA had issued in a September 1989 "National Combined Sewer Overflow Control Strategy." DEQ required defendant to complete a facilities plan and time schedules for elimination of CSOs.

Defendant maintained that it could not eliminate the CSOs during the period of the next five-year permit. Defendant and DEQ began discussing the use of a compliance order outside of the permit to provide a longer than five-year schedule for elimination of the CSOs. In August 1991, DEQ issued defendant a renewed NPDES permit for its sewer system. Simultaneously, the EQC approved a Stipulation and Final Order (SFO) addressing defendant's CSOs.

The SFO requires defendant to develop a plan and institute significant changes in its sewer system. Defendant must have a final facilities plan in 1994. The plan must be designed to attain compliance with applicable water quality standards at all CSOs either by December 1, 2006 or December 1, 2011.

CONCLUSIONS OF LAW

Plaintiffs raise two causes of action: (1) they allege that

defendant has violated the CWA by discharging pollutants into navigable waters through the CSOs without an NPDES permit, (the permit claim); and (2) that defendant violated the CWA by violating state water quality standards in the receiving waters, (the water quality claim).

Plaintiffs seek: (1) a declaration that defendant is in violation of the CWA; (2) an injunction setting a date for full compliance with the CWA and establishing a comprehensive schedule with "milestones adequate to ensure that the ultimate goal is met;" (3) civil penalties; and (4) attorney's fees.

I. Permit Claim

A. Injunctive Relief

Plaintiffs filed suite in March 1991, before the August 1991 renewal of the NPDES permit and the issuance of the SFO. Defendant argues that the request for injunctive relief under this claim is moot because it now discharges waste from the CSOs under a valid NPDES permit.

Plaintiffs concede that the CSOs are covered by the 1991 permit. Thus, the claim for injunctive relief insofar as it seeks to have the CSO discharges covered by a current permit, is moot.

Nonetheless, plaintiffs maintain that their request for injunctive relief on this claim is not completely moot. They contend that a mootness defense is available to defendant regarding injunctive relief only when actual corrective action has been taken to abate the underlying

behavior so that it could not reasonably be expected to recur. Because, plaintiffs maintain, the SFO's corrective action will take twenty years, defendant cannot prove that the discharges will not recur.

I agree with defendant. The CSOs are covered by the 1991 permit. The permit has been approved by DEQ and EPA. The corrective action is the SFO. The fact that it will take twenty years is regrettable. However, that is the course of action approved by DEQ. There simply is no present permit violation upon which to fashion injunctive relief.

B. Civil Penalties

Defendant argues that if the injunctive relief request is moot, the civil penalty portion of the permit claim is also moot. Alternatively, defendant argues that plaintiffs are barred from seeking civil penalties because the state commenced an enforcement action regarding the CSOs before plaintiffs initiated this suit, the state is diligently prosecuting the action, and the prosecution is occurring under a state law comparable to the federal penalty scheme found in section 309(g) of the CWA. 33 U.S.C. § 1319(g)(6).

I need not consider these arguments. Even if the request for civil penalties is not moot and section 1319(g)(6) does not bar plaintiffs' claim for penalties, defendant's NPDES permits cover the CSO discharges. There have been no unpermitted CSO discharges.

A five-year statute of limitations period applies to citizen enforcement actions under the CWA. *Sierra Club v.*

Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987). At issue here is the validity of the 1984 permit only. Nonetheless, language from the two earlier permits is relevant.

The 1974 permit allowed the discharge of treated effluent into the Columbia River from the treatment plant. Eimstad Aff., Exh. A at 1. It also separately stated:

> S6. The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at all diversion structures. Discharge at overflow points 003 through 066 is permitted when the flow at diversion structures exceeds three times the dry weather flow. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable to coincide with the water recreation season (June 1 to October 31 of each year) and in accordance with the infiltration-inflow plan adopted under Condition S2.

Id. at 2. Overflow points 003 - 066 are the CSOs. The 1979 permit, after identifying one outfall from the treatment plant as the only "source covered by this permit," contained language similar to the quoted passage from the 1974 permit. *Id.*, Exh. B at 2.

The 1984 permit listed two outlets from the treatment plant as "sources covered by this permit." *Id.*, Exh. C at 1. Unlike the previous two permits, the 1984 permit never referenced any other outfall numbers. Thus, the CSOs were not specifically identified in the permit. The 1984 permit did, however, without mentioning the specific outfall numbers, contain a passage similar to that in the 1974 and 1979 permits:

> 4. The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water recreation season (June 1 to October 31).

Id. at 2. The difference between the 1974 and 1979 permits on the one hand and the 1984 permit on the other is that the older permits specifically cited outfalls 003 - 066 amidst this nearly identical language.

Defendant argues that the 1984 permit covered the CSO discharges. Defendant acknowledges that the 1984 permit did not, as did the previous permits, reference the CSOs by outfall number. Defendant contends that the prior permits show that DEQ knew what diversion structures were, where they were, and how they worked when the 1984 permit was issued. When the 1984 permit is examined in light of the older permits, defendant maintains it is apparent that the 1984 permit simply used a shorthand method of referring to the same discharges.

Defendant further relies on the affidavit of Harold Sawyer, former Water Quality Division Administrator for DEQ. Sawyer oversaw Oregon's NPDES permit program until 1986. He states that Portland's entire sewer system, including CSO outfalls, was permitted by Portland's 1984 NPDES permit and by its prior NPDES permits. Sawyer Aff. at 2. He also states that combined sewer overflows that occurred after interception of three times dry weather flow were not considered to be violations of Portland's

1984 NPDES permit or any of its prior NPDES permits. *Id.*

Additionally, the final SFO states that:

> [Defendant's] prior NPDES permit, issued on September 18, 1984, did not expressly identify the combined sewer overflow discharge points that are part of the sewer system. Prior to the development of the [DEQ's] final draft "Oregon Strategy for Regulating Combined Sewer Overflows (CSOs)" on February 28, 1991, as a matter of policy the [DEQ] did not always list CSO discharge points in an NPDES permit but, in many instances, issued permits for an entire sewer system. EPA's Region 10 office approved the issuance of such permits. [Defendant's] 1984 NPDES permit is a permit for the sewer system, which includes CSO outfalls, but did not contain specific effluent limitations for CSOs.

Eimstad Aff., Exh. H at 2-3. Defendant argues that this demonstrates DEQ's intent that the 1984 permit covered the CSOs. Plaintiffs argue that because the CSOs were not listed under the "sources covered by this permit" section of the 1984 permit, that the plain language covered only the two outfalls from the treatment plant. Plaintiffs maintain that the subsequent permit language regarding diversion structures and the prohibited flow below three times the dry weather flow, should not override the clear language on the face of the permit setting for the sources covered by the permit.

Plaintiffs also argue that the fact that the 1984 permit purported to cover defendant's entire sewer system does not

mean that it covered the CSOs. Plaintiffs rely on *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 592 (D.C. Cir. 1980) for the proposition that CSOs are not considered part of a "treatment works." "Treatment works" refers to a device or system used in the treatment of sewage or wastes. *Id.* at 590 n. 17. It includes sewers, pipes, etc. only if they convey wastewater to a treatment plant. *Id.* The problem with plaintiffs' argument then, is that a sewer system that has CSOs, which do not convey wastewater to a treatment plant, is broader than a "treatment works." Thus, the fact that CSOs are not considered part of a "treatment works," does not mean that they are not part of a sewer system covered by an NPDES permit.

Plaintiffs rely on two documents suggesting that the 1984 permit did not cover the CSOs. First, they cite a February 1988 letter written by defendant's Bureau of Environmental Service's Chief Engineer W.C. Gaffi in which he states, in part:

> The City supports ODEQ's position to permit the CSO outfalls through a modification to the existing treatment plant permit. This approach should achieve the same goal as individual CSO permits and reduce the administrative cost of doing so.

Parenteau Decl., Exh. 16. According to plaintiffs, if the 1984 permit covered the CSOs, there would have been no need to state that they should be permitted through a modification to the "existing treatment plant permit."

Plaintiffs also rely on a February 1991 document entitled

"Oregon's Strategy for Regulating Combined Sewer Overflows (CSOs)," written by DEQ in response to EPA's National Combined Sewer Overflow Strategy. It states in part:

> 1. The City of Portland: 12 CSOs to the Columbia Slough and 43 to the Willamette River. None of these outfalls are covered by a permit, however, all are proposed to be addressed in the Portland - Columbia Blvd STP permit renewal.

Parenteau Decl., Exh. 13 at 5. Plaintiffs rely on this language to argue that the CSOs were not covered by the 1984 permit.

To refute this argument, defendant submits the affidavit of Barbara Burton, the author of the Oregon strategy document. She states that the language "none of these outfalls are covered by a permit" meant only that the CSOs were not individually listed and assigned effluent limitations. Burton Affidavit at 2. Her understanding was that the 1984 permit was for the entire sewer system including the CSOs. *Id.*

Plaintiffs' strongest argument rests with Gaffi's letter. A fair reading of the letter suggests that at least Gaffi himself did not view the 1984 permit as covering the CSOs. Nonetheless, I agree with defendant that the 1984 permit covered the CSOs.

First, the permit covered the entire sewer system which, as explained above, includes the CSOs. Additionally, to construe the permit as plaintiffs suggest would render the

language limiting the discharges in summer and prohibiting discharges of less than three times the average the dry weather flow, entirely meaningless. It is obvious from the 1974 and 1979 permits that this language was meant to address CSO discharges. I am also persuaded by Sawyer's affidavit as well as Burton's explanation that "none of these outfalls are covered by a permit" meant only that none of the CSOs was covered by an *individual* permit.

Gaffi's letter, though capable of suggesting that the permit did not cover the discharges, is not persuasive enough in the face of the common sense reading of the permit, which when examined in context with the older permits and when construed to give the language limiting discharges meaning, directs a conclusion that the 1984 permit covered the CSO discharges.

II. The Water Quality Claim

In this claim, plaintiffs argue first that defendant violated the CWA because the unpermitted CSO discharges violated Oregon water quality standards. Alternatively, plaintiffs maintain that even if the CSOs were discharging pursuant to the 1984 permit, defendant violated the permit conditions because the permit itself required compliance with Oregon water quality standards. Because the 1984 permit covered the CSO discharges, I need only consider plaintiffs' alternative argument.

The CWA authorizes citizen suits "(1) against any person . . . who is alleged to be in violation of (A) an *effluent standard or limitation under this chapter*. . . ." 33 U.S.C. § 1365(a)(1) (emphasis added). According to defendant,

plaintiffs cannot maintain their water quality claim because water quality standards do not equal "effluent standards or limitations under this chapter."

Generally, the term "effluent limitation" means "any restriction established by a State . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, ..." 33 U.S.C. § 1362(11). The Ninth Circuit has described water quality standards as follows:

> States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of those uses. Water quality standards are designed to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a). . . . [W]ater quality-based limitations relate to the environmental effects of different effluent levels.

Sierra Club v. Union Oil Co. of Calif., 813 F.2d 1480, 1489 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988).

As described by the Second Circuit in a case discussing the EPA's approval of state water quality standards were the "keystone of the federal pollution control program" prior to the 1972 enactment of amendments to the Federal Water Pollution Control Act (now known as the Clean Water Act). *Bethlehem Steel v. Environmental Protection Agency*, 538 F.2d 513, 515 (2d Cir. 1976). "If wastes discharged into receiving waters reduced the quality below permissible

standards, legal action could be commenced against the discharger." *Id.* (citation omitted).

Dissatisfaction with the water quality standards as a method of adequate pollution control enforcement led to their replacement with "effluent limitations." *Id.* "Instead of *indirectly* measuring discharges by their effect on water quality, monitoring equipment would *directly* measure discharges at their source." *Id.* (citation omitted)(emphasis in original). The court noted that although water quality standards and effluent limitations are related, they are entirely different concepts. *Id.*

The 1984 permit provided that "[n]otwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in [Oregon Administrative Rule 340-41-445]. . . ." Eimstad Aff., Exh. C at 2.

Plaintiffs argue that they may maintain a suit for water quality violations pursuant to 33 U.S.C. § 1365(f)(6), defining section 1365(a)(1)'s "effluent limitation or standard under this chapter" as a violation of an NPDES "permit or condition thereof." Because, plaintiffs argue, the prohibition on violating water quality standards is a condition of the 1984 permit, defendant may be sued for violations of that condition under section 1365(a)(1).

In 1988, the Eastern District of California held that "a state water quality standard can constitute an effluent standard or limitation enforceable under [section 1365(a)(1)] only if it has been incorporated into an NPDES permit." *McClellan*

Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988). Given the distinction between effluent limitations and water quality standards discussed above, and the problems with analyzing violations of water quality standards as opposed to effluent limitations, this holding is best interpreted to mean that state water quality standards can constitute effluent standards, violations of which may be actionable in a citizen suit, only if they are incorporated into an NPDES permit through effluent limitations.

Here, though the 1984 permit referred to state water quality standards, those standards were not incorporated in the permit through any effluent limitations on the CSOs. Contrary to plaintiffs' assertions, the lack of effluent limitations in the permit did not leave plaintiffs without a remedy. They could have challenged the sufficiency of the permit through the appropriate channel - an action filed in state court. *See* 33 U.S.C. § 1365(a)(1) (no basis for citizen suits to challenge state issued NPDES permits in federal court).

I agree with defendant that the mere reference to water quality standards in a permit does not make them "effluent standards or limitations" for purposes of sections 1365(a)(1) and (f). I also agree with defendant that plaintiffs' argument is nonsensical in that, according to plaintiffs, the 1984 permit allowed the CSO discharges but simultaneously rendered each discharge a violation of the permit through violations of water quality standards. It is extremely unlikely that DEQ would have put defendant in such an impossible position.

CONCLUSION

I find for defendant on plaintiffs' first and second causes of action.
DATED this 8th day of January, 1992.

/s/
OWEN M. PANNER
United Stated District Judge